Supreme Court, U.S.
FILED
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No. 03-__ 031398

IN THE

# Supreme Court of the United States

Eugene Crum, Jr., et al.

*Petitioners,*

v.

Thomas G. Flowers, et al.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Did the court of appeals err in holding that petitioners lacked standing to appeal the district court's denial of their motion for civil contempt sanctions for the sole reason that they were not named as parties in the underlying litigation?

2. Does Federal Rule of Civil Procedure 71 permit intended, although not individually named, beneficiaries of an injunction to seek enforcement of that injunction?

## PARTIES TO THE PROCEEDINGS BELOW

In addition to the petitioner named in the caption, the following parties appeared below and are petitioners here: Charles E. Archie, Jr.; Carolyn Ball; Carol Banks; David Barley; John Bradford; Milton Burton; Pauline Burton; Lynn Carter; Clyde Chatman; Preston Coleman; Betty Crum; Eugene Crum, Jr.; Grant Culliver; Jerome F. Dangerfields; Etheline Duster; Venus Edwards; Mable G. Elliott; Andrey D. Finch; Samuel Foster; Lewis Gilchrist; Freddy Golthy; Terry Dale Goodson; Ricky Grider; Romanza A. Hamilton; Willie Harris; Michael Hopkins; Jacquelyn J. Jackson-Kelly; Yvonne C. Jennings; Gladys Jones; Theodore Jones; Willie Kelley; Deborah F. Lumpkin; Katherine Matthews; Roosevelt Mays, Jr.; Shirley Mays; Eddie G. McCoy; Robert E. Moore; Benny Newton; Herman Powell; Samuel L. Price; Pamela Ramos; Kenneth Rodgers; David Said; Geneice Smith; Robert L. Smith; Wanda Jackson Speights; Thornton Taylor; Ellen Tolbert; Earl Vaughn; Nonie Williams; John W. Winston; Tamblyn Witherspoon; Darrell Wright; Earnest Wright; and a class of black persons who are employed, have been employed, or who may in the future be employed by the State of Alabama and its agencies, boards, commissions and officials, the Florence/Lauderdale County Emergency Management Agency, Lauderdale County, and the Lauderdale County Commission.

In addition to the respondent named in the caption, the following parties appeared below and are respondents here: Florence/Lauderdale County Emergency Management Agency; Lauderdale County; Lauderdale County Commission; State of Alabama and its agencies, boards, commissions and officials including: Alcoholic Beverage Control Board; Board of Accountancy; Bureau of Tourism

and Travel; Commission on Aging; Commission on Physical Fitness; Department of Agriculture and Industries; Department of Conversation and Natural Resources; Department of Corrections; Department of Economics and Community Affairs; Department of Education; Department of Human Resources; Department of Industrial Relations; Department of Labor; Department of Mental Health; Department of Public Health; Department of Rehabilitation Services; Department of Revenue; Department of Voter Registration; Development Office; Emergency Management Agency' Industrial Development Training Agency; Labor Board; Medicaid Agency; State Board of Registrars; State Docks; State Personnel Board; State Personnel Department.

The plaintiff in the underlying litigation, *United States* v. *Flowers*, was the United States.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners Eugene Crum, Jr., et al., petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

## OPINIONS BELOW AND JURISDICTION

The court of appeals' order dismissing petitioners' appeal (Pet. App. 1a) is unpublished. The court of appeals' order to show cause why the appeal should not be dismissed (*id.* 21a) is unpublished. The district court's order denying petitioners' motion for contempt (*id.* 2a) is published at 213 F.R.D. 592, 2003 U.S. Dist. LEXIS 5688. This Court has jurisdiction under 28 U.S.C. 1254.

## RELEVANT STATUTORY PROVISION

28 U.S.C. 1291 provides in relevant part: "The courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *."

## STATEMENT OF THE CASE

1. This case arises from the continuing efforts of African-American citizens of Alabama to force their state government to comply with its obligations under the Equal Protection Clause of the U.S. Constitution as well as Title VII of the Civil Rights Act of 1964. The state's history of employment discrimination against African Americans and its ongoing refusal to comply with court orders issued to remedy that discrimination are well documented. In 1970, in *United States* v. *Frazer*, 317 F. Supp. 1079, 1990 (1970) (*Frazer I*),[1]

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[1] *United States* v. *Frazer* (Civil Action No. 68-T-2709-N) is now technically styled *United States* v. *Flowers* in light of the substitution of a new head of the State Personnel Department. The district court has continued to refer to that case as the *Frazer* litigation for purposes of continuity, see Pet. App. 3a, a convention we follow.

the United States District Court for the Middle District of Alabama found that racial discrimination "has so permeated the employment practices of the defendants that [it is] necessary to enter a detailed and specific decree which will not only prohibit discrimination but which will also prescribe procedures designed to prevent discrimination in the future and to correct the effects of past discrimination."

The court accordingly issued just such a decree, mandating that state agencies take specific steps in their policies regarding recruitment, hiring, treatment, assignment, promotion, and dismissal of employees. With the exception of a single provision pertaining to certain named individuals, each of these provisions barred discriminatory treatment of "Negro applicants" and/or "Negro employees" generally. *Frazer I*, 317 F. Supp. at 1090-93. In 1976, recognizing that "systematic discrimination against black citizens of Alabama has been as extensive" as it was before the original 1970 decision, the district court modified the injunction to impose a number of additional requirements; every provision again was expressly designed to protect the rights of "black applicants" and "black employees." *United States* v. *Frazer*, No. CIV.A.2709-N, 1976 WL 729, at *1, *6-*8 (M.D. Ala. Aug. 20, 1976) (*Frazer II*). The district court has retained jurisdiction, and the injunction remains in effect today, as the court has never found that the state has complied with its provisions.

Petitioners represent a class of over a hundred thousand African-American applicants and employees of various departments and agencies of the State of Alabama who brought a series of lawsuits to enforce the *Frazer* injunction, as well as seeking additional relief under the civil rights laws. In 1994, these lawsuits were consolidated as *In Re Employment Discrimination Litigation Against The State of Alabama*, No. CIV.A.94-T-356-N, also known as *Crum, et al.* v. *State of Alabama* (*Crum*).

In 1997, petitioners' claims in *Crum* were furthermore formally consolidated with the *Frazer* case based on the district court's determination that "[t]he claims in the *Crum* litigation have substantial commonality with issues and claims already litigated and decided in *Frazer*." Pet. App. 4a.

2. This petition arises from petitioners' motion to enforce the *Frazer* injunction through a motion for contempt. Petitioners based their motion on Federal Rule of Civil Procedure 71 ("Rule 71"), which provides in relevant part that "[w]hen an order is made in favor of a person who is not a party to the action, that person may enforce obedience to the order by the same process as if a party * * *." FED. R. CIV. P. 71. At the direction of the district court, petitioners filed their motion in the consolidated *Frazer* action.[2]

Petitioners specifically allege that various departments and agencies of Alabama continued to follow the same practices that the district court had already permanently enjoined. For example, petitioners alleged that defendants continue to use "closed registers," which make it impossible for African Americans to apply for historically white job classifications for prolonged periods of time. *Frazer* Doc. 583-6-7. The *Frazer* injunction specifically held this practice unlawful and barred it. *Frazer II*, 1976 WL 729, at *5, *7. In addition, petitioners' contempt motion alleges that defendants have continued "deferring requests for certification" and previewing job registers in the same way that has already been enjoined in *Frazer*. *Frazer* Doc. 583-6-7; see *Frazer II*, 1976 WL 729, at *4 (state agencies circumvented decree by "requesting certificates of eligibility only at times when no blacks were available for certification"). These continuing practices, and numerous others detailed in petitioners' complaint, demonstrate Alabama's disregard of its obligations

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[2] Petitioners initially sought relief in the *Crum* suit, but in April 2001, the district court dismissed the Rule 71 motion in *Crum* without prejudice to their right to refile it as a civil contempt motion in *Frazer*.

under the *Frazer* injunction and supported a finding of contempt.

The district court denied the motion on the ground that petitioners were powerless to seek to enforce the *Frazer* injunction. Pet. App. 19a. The district court disagreed with respondents that nonparties are never entitled to enforce injunctions. But the court agreed with respondents that only those nonparties who are *individually named* in the injunction are entitled to invoke Rule 71. The district court relied primarily on *Northside Realty Associates, Inc.* v. *United States*, 605 F.2d 1348, 1356-58 (CA5 1979), which held that, in cases in which it is a party, the United States may not seek civil contempt damages on behalf of third-party beneficiaries. See Pet. App. 8a-10a.

Petitioners duly filed a timely notice of appeal. The parties then briefed the issue of whether and to what extent Rule 71 permits nonparty beneficiaries to enforce a court order.

After receiving petitioners' brief on the merits, the court of appeals sua sponte requested supplemental briefing, stating that "as it appears that Appellants are not parties to the [*Frazer*] litigation, the parties are ordered to show cause * * * *why this appeal should not be dismissed for lack of standing*." Pet. App. 21a (emphasis added). Petitioners submitted supplemental briefing explaining that, because the district court had denied their motion for contempt, they were "parties" to the denial with standing to appeal under precedents such as *Devlin* v. *Scardelletti*, 536 U.S. 1 (2002). Respondents filed a supplemental brief that forthrightly did not contest the standing of petitioners to appeal. See Resp. C.A. Br. 4 ("defendants assume that if Rule 71 applied and the *Crum* Plaintiffs otherwise had standing to file their contempt motion, they also should be regarded as having standing to appeal").

The court of appeals nonetheless dismissed the appeal for lack of standing. The court ruled that because petitioners "are

not parties to the *U.S. v. Flowers* [*Frazer*] litigation, this appeal is DISMISSED for lack of standing." Pet. App. 1a.[3]

This petition followed.

## REASONS FOR GRANTING THE WRIT AND SUMMARILY REVERSING THE COURT OF APPEALS' JUDGMENT

Petitioners request that this Court grant certiorari and summarily reverse the judgment of the court of appeals. Summary reversal is appropriate because the decision below flatly conflicts with this Court's repeated holdings that persons bound by a district court's decision are "parties" to the decision with standing to appeal therefrom. Furthermore, summary reversal will force the court of appeals to take a position on the important issue it circumvented with its bizarre disposition of this case: whether and to what extent Federal Rule of Civil Procedure 71 allows nonparty intended beneficiaries to enforce injunctions. That issue, which has divided the circuits, merits this Court's review, and the Eleventh Circuit's articulation of its view would add measurably to the percolation of that issue in the lower courts.

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[3] As noted in the order, the court of appeals had already dismissed petitioners' appeal to the extent that it constituted an appeal from the district court's judgment in *Crum*, on the grounds that no final judgment existed in that case, since petitioners, although barred from enforcing the *Frazer* injunction, were still free to re-litigate the state's Title VII and Section 1983 liability. On petitioners' motion, the district court then certified the *Crum* case as meriting interlocutory appeal under 28 U.S.C. 1292(b). The court of appeals has not acted on petitioners' request for interlocutory review, which respondents have vigorously opposed.

## I. Summary Reversal Is Appropriate Because The Eleventh Circuit's Holding That Nonparties Lack Standing To Appeal Directly Contravenes Supreme Court Precedent.

The court of appeals' order below held: "As Appellants are not parties to the *U.S.* v. [*Frazer*] litigation, this appeal is DISMISSED for lack of standing." Pet. App. 1a. Thus, the court held that appellants (petitioners here) lacked standing to appeal the district court's disposition of their motion, for the *sole and sufficient reason* that they were not parties to the underlying litigation. This ruling runs directly afoul of this Court's repeated holdings that nonparties may appeal adjudications that are binding upon them. See, *e.g.*, *Devlin* v. *Scardelletti*, 536 U.S. 1, 8 (2002); *United States Catholic Conference* v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988). Here, petitioners appealed from the denial of their *own motion*, and that denial clearly binds them as a final disposition of their motion. See 28 U.S.C. 1291 (courts of appeals have jurisdiction over appeals from "final decisions of the district courts"). The court of appeals' egregious error merits summary reversal; indeed, the court of appeals' rationale and disposition are so clearly wrong that even respondents expressly declined to press them below.

1. In a long line of cases, this Court has held that nonparties who are bound by a court's decision may appeal from it. The Court most recently considered this issue in *Devlin*, holding that unnamed class members may appeal the approval of a class action settlement to which they have objected. 536 U.S. at 10. The Court held that the argument that these class members were not "parties," and therefore could not appeal, was contrary to precedent:

> We have never, however, restricted the right to appeal to named parties to the litigation. In *Blossom* v. *Milwaukee & Chicago R. Co.*, 68 U.S. (1 Wall.) 655, 17 L. Ed. 673 (1864), for instance, we allowed a bidder for property at a foreclosure sale, who was not a named party in the

> foreclosure action, to appeal the refusal of a request he made during that action to compel the sale. In *Hinckley* v. *Gilman, C., & S. R. Co.*, 94 U.S. 467, 24 L. Ed. 166 (1877), we allowed a receiver, who was an officer of the court rather than a named party to the case, to appeal from an order "relating to the settlement of his accounts," reasoning that "for this purpose he occupies the position of a party to the suit." *Id.* at 469. More recently, we have affirmed that "the right of a nonparty to appeal an adjudication of contempt cannot be questioned," *United States Catholic Conference* v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76, 101 L. Ed. 2d 69, 108 S. Ct. 2268 (1988), given the binding nature of that adjudication upon the interested nonparty.
>
> Justice Scalia attempts to distinguish these cases by characterizing them as appeals from collateral orders to which the appellants "*were* parties." * * * But it is difficult to see how they were parties in the sense in which Justice Scalia uses the term – those "named as a party to an action," usually "in the caption of the summons or complaint." * * * Because they were not named in the action, the appellants in these cases were parties only in the sense that they were bound by the order from which they were seeking to appeal.

*Devlin*, 536 U.S. at 7-8. The Court thus concluded that because the unnamed class members in *Devlin* were similarly bound by the order they were challenging, they too had a right to appeal:

> The District Court's approval of the settlement – which binds petitioner as a member of the class – amounted to a "final decision of [petitioner's] right or claim" sufficient to trigger his right to appeal. See *Williams* v. *Morgan*, 111 U.S. 684, 699, 28 L. Ed. 559, 4 S. Ct. 638 (1884) (describing the cases discussed above). And like the appellants in the prior cases, petitioner will only be allowed to appeal that aspect of the District Court's order

> that affects him – the District Court's decision to disregard his objections.

*Id.* at 9.

As in *Devlin*, here, the district court's denial of petitioners' own motion clearly binds petitioners: it is a "final decision of [their] right" to enforce the underlying *Frazer* injunction. Petitioners are estopped from seeking in the same or any other court to enforce that injunction. Furthermore, just as the *Devlin* petitioners only appealed the district court's decision to disregard their objections, petitioners here appeal only the specific district court order in the *Frazer* litigation that concerns their own motion; they do not claim a right to appeal any other order.

2. Indeed, petitioners' appeal here satisfies even the standard proposed by Justice Scalia in his *Devlin* dissent (*id.* at 16-17): just as in *Blossom*, *Hinckley*, and *United States Catholic Conference*, the district court order on appeal here is a collateral order that specifically addresses the rights of petitioners themselves. Petitioners' claim is most similar to that at issue in *Blossom*, because it is an appeal from the denial of a motion petitioners filed. In *Blossom*, the Court explained that although it was "certainly true" that the appellant there could not "appeal from the original decree of foreclosure, nor from any other order or decree of the court made prior to his bid," it was nonetheless "well settled, that after a decree adjudicating certain rights between the parties to a suit, other persons having no previous interest in the litigation may become connected with the case, in the course of the subsequent proceedings." 68 U.S. at 655-56. Such persons may "appeal from the order denying" the motions they themselves file. *Devlin*, 536 U.S. at 17 (Scalia, J., dissenting). Similarly, here, although petitioners do not claim a right to appeal from other orders in the *Frazer* case issued prior to their motion to enforce the *Frazer* injunction, they do have a right to appeal the district court's disposition of their own motion. See also *United States Catholic Conference*,

487 U.S. at 76 ("The right of a nonparty to appeal an adjudication of contempt cannot be questioned.").

The contrary rule the court of appeals would impose – that nonparties to the underlying litigation may not appeal even orders denying motions they themselves have filed and directly purporting to bind them – has never been even remotely suggested by the other courts of appeals, which instead have faithfully applied the rule of *Devlin* and its predecessors that anyone bound by an order may appeal it. See, *e.g.*, *In re Bridgestone/Firestone Tire Prods. Liab. Litig.*, 333 F.3d 763, 768 (CA7 2003); *Cordoza* v. *Pac. States Steel Corp.*, 320 F.3d 989, 995-96 (CA9 2003); *Karaha Bodas Co.* v. *PERTAMINA*, 313 F.3d 70, 81-82 (CA2 2002). Indeed, the rule established by the Eleventh Circuit is so illogical that not even respondents argued for it below. See Resp. C.A. Br. 4.

That rule would mean that a district court's denial of a motion to intervene in a case would, like the denial of a Rule 71 motion, always be unreviewable, because persons denied intervention are also "not parties to the [underlying] litigation." Pet. App. 1a. But that is not the law; denials of motions to intervene "are, of course, appealable." *Marino* v. *Ortiz*, 484 U.S. 301, 304 (1988) (citing *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977)).[4]

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[4] Nor was there any need in this case for petitioners to seek intervention for the purpose of appeal; such intervention is only required where appellants appeal from an order that does not resolve a motion they themselves brought, and that does not directly bind them. See *Marino* v. *Ortiz*, 484 U.S. 301, 304 (1988) (holding that white police officers could not, without first intervening for the purposes of appeal, appeal the settlement in a Title VII suit brought by minority officers against a city police department). *Devlin* specifically held that intervention for the purposes of appeal is *not* required where the appeal is from an order binding on appellants. 536 U.S. at 7-8; *id.* at 9 (distinguishing *Marino* on the basis that the district court order from which the

3. Because the court of appeals' order represents a "demonstrably erroneous application of federal law," summary reversal is appropriate. *Maryland* v. *Dyson*, 527 U.S. 465, 467 n.1 (1999). This Court has frequently summarily reversed unpublished orders. See, *e.g.*, *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504 (2001); *Nat'l Mines Corp.* v. *Caryl*, 497 U.S. 922 (1990); *Olden* v. *Kentucky*, 488 U.S. 227 (1988); *California* v. *Prysock*, 453 U.S. 355 (1981). Moreover, the underlying issue regarding third-party enforcement of court orders is an important one that has divided the circuits, as discussed *infra*. Reversal on the standing to appeal issue and remand would encourage the Eleventh Circuit to articulate a stance and reasoning on the Rule 71 issue and thus facilitate future review by this Court with the benefit of percolation in the lower courts.

## II. The Scope Of Rule 71 Is An Important Issue That Has Divided The Circuits; Remand Would Force The Court Of Appeals To Address The District Court's Erroneous Interpretation And Would Aid This Court's Future Review.

The court of appeals' circumvention of the key issue at the heart of this case – to what extent Rule 71 permits intended beneficiaries to enforce court orders – is especially unfortunate, because that issue is frequently litigated and has sharply divided the circuits. The district court in this case interpreted prior Eleventh Circuit precedent to reach a conclusion no court had previously reached: that only beneficiaries who are individually named in a court order may invoke Rule 71 to enforce it. A remand would force the court of appeals to clarify its position on this important issue, which would benefit this Court if and when it ultimately grants review, as it should, to resolve this circuit split.

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*Marino* appellants appealed "did not finally dispose of any right or claim" of appellants).

Federal Rule of Civil Procedure 71 provides, in relevant part: "When an order is made in favor of a person who is not a party to the action, that person may enforce obedience to the order by the same process as if a party * * *." See *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 n.2 (2000). Thus, nonparty beneficiaries may enforce court orders under Rule 71. See, *e.g.*, *Brennan* v. *Nassau County*, 352 F.3d 60, 64-65 (CA2 2003); *Floyd* v. *Ortiz*, 300 F.3d 1223, 1226-27 (CA10 2002); *Washington Hosp.* v. *White*, 889 F.2d 1294, 1299 (CA3 1989); *South* v. *Rowe*, 759 F.2d 610, 612 n.1 (CA7 1985). However, the courts are sharply divided as to the scope of this enforcement right. Two circuits have held that Rule 71 does not apply at all in the context of consent decrees and have not pronounced on its scope in other contexts; meanwhile, five circuits have rejected this limit on the types of cases in which Rule 71 can be invoked, but have adopted varying rules regarding *who* can invoke it.

1. This circuit split has stemmed from the courts of appeals' efforts to make sense of this Court's statement in *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975), that "a consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it even though they were intended to be benefited by it," *id.* at 750. Although *Blue Chip* did not address Rule 71, the Sixth and Eleventh Circuits have concluded, based on a literal reading of the Court's statement, that Rule 71 may not be applied at all in the consent decree context. *Reynolds* v. *Butts*, 312 F.3d 1247, 1249-50 (CA11 2002); *Aiken* v. *City of Memphis*, 37 F.3d 1155, 1167-68 (CA6 1994) (acknowledging circuit split). The other courts of appeals have refused to infer such a significant limit on Rule 71 from a statement not addressing the Rule at all. See, *e.g.*, *Beckett* v. *Air Line Pilots Ass'n*, 995 F.2d 280, 288 (CADC 1993) (refusing to "eviscerate Rule 71 in the context of consent decree enforcements"); *Hook* v. *Ariz. Dep't of Corrections*, 972 F.2d 1012, 1014 (CA9 1992). However, their various approaches to reconciling *Blue Chip*

with Rule 71 have resulted in conflicting interpretations of the Rule that carry implications for cases outside the consent decree context as well, as this case demonstrates.

The Second Circuit has taken the view that *Blue Chip* simply does not apply "to preclude nonparties from intervening to enforce a consent decree where otherwise authorized by the federal rules of civil procedure." *Berger* v. *Heckler*, 771 F.2d 1556, 1565 (CA2 1985). The Ninth and Tenth Circuits have construed *Blue Chip* to reflect, rather than a categorical bar on third-party enforcement, a standing rule: Rule 71 authorizes enforcement of court orders by "intended" but not "incidental" beneficiaries. See *Hook*, 972 F.2d at 1015; *Floyd* v. *Ortiz*, 300 F.3d 1223, 1226-27 (CA10 2002); see also *Moore* v. *Tangipahoa Parish Sch. Bd.*, 625 F.2d 33, 34 (CA5 1980) (applying a similar standing requirement to Rule 71's application outside the consent decree context). Petitioners satisfy this standing requirement easily; as African-American employees of the State of Alabama, they are precisely the people the decree was designed to benefit. In *Securities & Exchange Commission (SEC)* v. *Prudential Securities, Inc.*, 136 F.3d 153 (1998), however, the D.C. Circuit took this "intended beneficiary" test a step further, holding that a nonparty is merely an "incidental beneficiary" of a consent decree unless the language of the decree makes clear that the nonparty was to be given the right to sue to enforce it; a mere intent to *benefit* the third party is not enough. *Id.* at 159. The court left open the question whether the intent to allow third-party suits must be expressed explicitly in the language of the consent decree. Nor did the D.C. Circuit explain whether its intent-based approach was applicable also to the enforcement of court orders other than consent decrees.

2. Without expressly relying on any of these interpretations, the district court in this case adopted an even narrower version of the "intended beneficiary" test, and applied it beyond the context of consent decrees to which *SEC*'s logic had applied. In the district court's view, a court

order is only "in favor of" a nonparty if that nonparty is individually *named* in the order. Pet. App. 11a. Thus, even though the *Frazer* order provided a litany of specific benefits for African-American "employees" and "applicants" for jobs with the Alabama government, other than those specified for the named plaintiffs, the district court held that the order was not "in favor of" those applicants. This interpretation of Rule 71 is flatly wrong. Nothing in the text of Rule 71 refers to "named" or "identified" third parties. The limitation the district court invented out of whole cloth would prevent Rule 71 from ever being invoked to enforce decrees like this one, or those in many other important civil rights cases, intended to provide for systematic changes over an extended period of time. It would have been impossible for the court to specify the intended beneficiaries of its order with any greater specificity than it did; the identities of future African-American job applicants and employees were obviously unknown when the order was issued twenty-four years ago.

Statutory construction should have ended with the plain terms of Rule 71. "We give the Federal Rules of Civil Procedure their plain meaning, and * * * 'when we find the terms unambiguous, judicial inquiry is complete.'" *Pavelic & LeFlore* v. *Marvel Entm't Group*, 493 U.S. 120, 123 (1989) (quoting *Rubin* v. *United States*, 449 U.S. 424, 430 (1981)); *Barnhart* v. *Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002). Moreover, the plain-language construction is also consistent with the purposes of Rule 71. By requiring an enjoined party to comply with an existing order at the behest of a nonparty beneficiary, Congress in crafting Rule 71 maximized the enjoined party's incentive to comply with such order by removing any prospect that re-litigation of the enjoined practices might be allowed. "The purpose of Rule 71 is to insure that all court orders are fully enforceable in favor of and against all persons who are properly affected by a judgment, whether or not they are formally parties to the suit." 13 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 71.02 (3d ed. 2002).

In reaching its interpretation of Rule 71, the district court relied on the circuit precedent of *Northside Realty Associates, Inc.* v. *United States*, 605 F.2d 1348, 1356-58 (CA5 1979), which is not a Rule 71 case. In *Northside*, the court of appeals held that the United States – a *party* to the underlying litigation – could not, as part of a civil contempt motion, seek compensatory damages on behalf of the third parties whom the order was intended to benefit. From this holding, the district court inferred that the third-party beneficiaries were not entitled to seek a contempt order on their *own* behalf. But the combination of the *Northside* rule itself with the converse rule the district court inferred means that *no* civil contempt remedy is possible to enforce orders, such as the *Frazer* injunction, to which the United States is a party. The civil contempt remedy depends on there being a harmed party with standing to seek compensation. When an order is issued on behalf of a group of citizens, as here, and neither the United States nor the citizens themselves have standing to seek a civil contempt remedy to enforce that order (as the district court held), one of the major deterrents against noncompliance is eviscerated. Remand will allow the court of appeals to clarify whether it intended to create this untenable situation.

3. The conflict surrounding the interpretation of Rule 71 is an important one meriting this Court's review. As the above cases demonstrate, this issue arises frequently in the courts of appeals. Furthermore, it arises frequently in cases, like this one, involving litigation of great social significance, in which court orders of long duration are entered and the court retains jurisdiction to supervise compliance.

Moreover, the enormous significance of this case in particular means that this Court should not simply wait for another case to resolve this circuit split, but should summarily reverse, remand, and force the Eleventh Circuit to take a position as to whether it intended either *Northside* or *Reynolds* (which itself dealt only with consent decrees) to extend so far as to bar petitioners' claims. This case concerns

the rights of approximately 30,000 African-American employees of the State of Alabama, as well as 73,000 unsuccessful African-American job applicants. As the state's sorry record of compliance with the *Frazer* injunction demonstrates, racial discrimination in Alabama government employment is still alive and well. It is for this reason that the *Frazer* injunction remains in place, and unless and until the *Frazer* court determines that the injunction is no longer necessary, the African-American citizens whose rights it was entered to protect must be allowed to enforce it.

Petitioners' other option, to re-litigate the liability issues through an entirely new Title VII claim, falls far short of vindicating the important civil rights the *Frazer* injunction was designed to uphold. First, Alabama's record of systematic employment discrimination against African Americans has already been proven, and the court has already carefully fashioned a set of remedial measures for that discrimination. It is duplicative, wasteful, and unreasonable for petitioners to be required to re-litigate those issues; the entire reason courts fashion continuing remedies in complex civil rights cases like this one is to remove this burden from potential future plaintiffs and instead require them only to demonstrate noncompliance with the injunction. Second, civil contempt sanctions can be entered immediately, while remedies in the *Crum* Title VII case will only come after years of litigation. The immediate entry of coercive sanctions is necessary to force the more rapid elimination of race as a factor in state agencies' employment decisions.

The importance of civil contempt proceedings in triggering Alabama's compliance with the antidiscrimination laws is vividly demonstrated by the history of a case related to this one, *Reynolds* v. *Alabama Department of Transportation*, CV-85-T-665-N (M.D. Ala.). *Reynolds* was a class action discrimination lawsuit filed in 1985 against two of the *Frazer* and *Crum* defendants – the Alabama State Personnel Department and Alabama Department of Transportation. In 1992, both defendants entered into a

consent decree whose intent and purpose were to "undo the effects of the past practices which have been the subject of this case and Decree and to prevent further practices which may perpetuate such efforts or otherwise discriminate against the plaintiffs or the class they represent." *Reynolds* Doc. no. 553 at 52. In 1999, both defendants admitted that they had not complied with the decree, and were held in contempt of all twenty-one of the decree's articles. Since then the State has paid over $14 million in fines imposed by the court to coerce its compliance with the decree, and it continues to pay fines even today. Without these fines, continued noncompliance with court orders was a virtual certainty. It was only *after* a finding of contempt that the State made any progress at all toward compliance with the consent decree. The course of the *Reynolds* litigation demonstrates that the coercive power of contempt has a far greater impact on the State of Alabama's compliance with its civil rights obligations than does an initial judicial finding of liability for discrimination.

## CONCLUSION

For the foregoing reasons, this Court should grant certiorari in this case and should summarily reverse the judgment of the court of appeals.

Respectfully submitted,

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# APPENDIX

Filed December 5, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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03-12305-FF

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2:68cv2709

UNITED STATES OF AMERICA,
Plaintiff,
EUGENE CRUM, JR., ROBERT L. SMITH, *et al* .,
Interested Parties-Appellants,

versus

THOMAS G. FLOWERS,
ALABAMA STATE EMPLOYEES, *et al*.,
Defendants-Appellees.

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On Appeal from the United States District Court for the
Middle District of Alabama

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BEFORE: ANDERSON, BLACK, and CARNES, Circuit Judges.

BY THE COURT:

As Appellants are not parties to the *U.S. v. Flowers* litigation, this appeal is DISMISSED for lack of standing.

United States District Court,
M.D. Alabama,
Northern Division.

In re EMPLOYMENT DISCRIMINATION LITIGATION AGAINST THE STATE OF
ALABAMA, et al.
Eugene Crum, Jr., et al., Plaintiffs,
v.
State of Alabama, et al., Defendants.
United States of America, Plaintiff,
v.
Thomas Flowers, et al., Defendants,
Alabama State Conference of NAACP Branches, Amicus Curiae.

Nos. CIV.A.94-T-356-N, CIV.A.68-T-2709-N.

March 28, 2003.

ORDER

MYRON H. THOMPSON, District Judge.

These causes are before the court on the question of whether the plaintiffs in *Crum* v. *Alabama*, civil action no. 94-T-356-N, who are African-Americans claiming that they have suffered employment discrimination at the hands of the defendants (who are the State of Alabama, its agencies, departments, subdivisions, and individual and official agents) may pursue sanctions for civil contempt. As grounds for contempt, the *Crum* plaintiffs allege that the *Crum* defendants are in violation of orders entered by this court in *United*

*States v. Flowers*, civil action no. 68-T-2709, in which the United States brought suit to vindicate the state employment rights of Alabama's African-American citizens. *See generally United States v. Frazer*, 317 F. Supp. 1079 (M.D.Ala. 1970) (Johnson, J.). (Because this case was previously styled *United States v. Frazer* and is still usually referred to as *Frazer*, the court will continue to refer to it as *Frazer*.)

By orders entered in both *Crum* and *Frazer* on June 19, 2001, the court held that the *Crum* plaintiffs could not so proceed, and stated that an opinion would follow.[5] Before the opinion could be issued,[6] the *Crum* plaintiffs moved the court to reconsider its decision. The parties in both cases have now extensively briefed the original question of whether the *Crum* plaintiffs may proceed against the *Crum* defendants for contempt based on *Frazer* orders as well as the grounds for reconsidering the court's ruling. For the reasons that follow, the court remains convinced that the *Crum* plaintiffs may not proceed against the *Crum* defendants for civil contempt, and, accordingly, the motion to reconsider will be denied. Moreover, in light of the motion for reconsideration, the court will not issue the opinion it originally indicated would be forthcoming; the instant order suffices to explain the court's reasoning for its initial decision not to permit the contempt proceedings to go forward in *Crum*.

## I. BACKGROUND

A recent decision of the Eleventh Circuit Court of Appeals summarizes the background of the *Crum* case. *In re Employment Discrimination Against the State of Alabama*,

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[5] *Crum* Doc. no. 442; *Frazer* Doc. no. 593.

[6] Indeed, in light of the motion for reconsideration, the court will not issue the opinion it originally indicated would be forthcoming. The instant order suffices to explain the court's reasoning for its initial decision not to permit the contempt proceedings to go forward.

198 F.3d 1305, 1308-09 (11th Cir. 1999). The material background facts are as follows: By order entered March 24, 1994, the court consolidated several race-discrimination cases brought by African-American plaintiffs against the State of Alabama and several of its boards, departments, and agencies; the *Crum* plaintiffs also sued the Governor of Alabama and other state officials in their individual and official capacities.[7] Some of the cases were class actions in which the plaintiffs sought relief on behalf of themselves and all other persons similarly situated who were or are employed, or who may be employed in the future by the defendants.

The *Crum* plaintiffs claim, in part, that they suffer discrimination in layoffs, recalls from layoffs, terminations, discipline, hiring, rehiring, evaluations, compensation, transfers, job-duty assignments, recruitment, screening, selection procedures, denial of promotions, demotions, rollbacks, sick leave, subjective decision-making practices, and other terms and conditions of employment that have resulted in disparate impact and treatment of the *Crum* plaintiffs and their putative class. As relief, the *Crum* plaintiffs seek declaratory, injunctive, and compensatory relief under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. 1981a, 2000e through 2000e-17; the Civil Rights Act of 1866, as amended, 42 U.S.C.A.' 1981; and the fourteenth amendment as enforced through 42 U.S.C.A. 1983.

The claims in the *Crum* litigation have substantial commonality with issues and claims already litigated and decided in *Frazer*, a lawsuit brought by the United States, as stated, to redress systemic and pervasive racially discriminatory employment practices by the State of Alabama and many of its boards, agencies, departments, and officials. *Frazer*, 317 F. Supp. at 1081. In *Frazer*, after a trial, the court found in favor of the United States and entered relief

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[7] *Crum* Doc. no. 1.

permanently enjoining the defendants from "engaging in any employment practices, including recruitment, examination, appointment, training, promotion, retention, or any other personnel action, for the purpose of or with the effect of discriminating against any employee, or actual or potential applicant for employment, on the ground of race or color." *Id.* at 1090; *see also NAACP v. Allen*, 340 F.Supp. 703 (M.D.Ala.1972) (Johnson, J.). Many of the *Crum* defendants are subject to the relief entered in *Frazer*, enjoining them from engaging in many of the practices alleged by the *Crum* plaintiffs.

On September 17, 1997, after briefing and oral argument, the court entered an order consolidating the *Crum* litigation with the *Frazer* litigation "to the extent that there are issues common to both."[8] Because the proper procedure for seeking to enforce injunctive relief is through contempt proceedings, *Florida Ass'n for Retarded Citizens v. Bush*, 246 F.3d 1296, 1298 (11th Cir.2001); *Reynolds v. Roberts*, 207 F.3d 1288, 1298 (11th Cir.2000), the court dismissed all *Frazer* claims without prejudice to the rights of appropriate persons or entities to file motions for contempt.[9] The *Crum* plaintiffs moved the court to require the *Crum* defendants to show cause why they should not be held in contempt of court based on the relief entered in *Frazer*.[10] The court entered an order so requiring; the court also invited the United States as the original *Frazer* plaintiff to submit its views on whether the *Crum* plaintiffs could seek contempt sanctions based on *Frazer* orders.[11]

## II. DISCUSSION

The *Crum* plaintiffs contend that Federal Rule of Civil Procedure 71 authorizes them to seek contempt for alleged violations of *Frazer* orders, and they claim that they have

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[8] *Crum* Doc. no. 307; *Frazer* Doc. no. 514.

[9] *Crum* Doc. no. 416; *Frazer* Doc. no. 514.

[10] *Crum* Doc. no. 413; *Frazer* Doc. no. 583.

[11] *Crum* Doc. no. 420; *Frazer* Doc. no. 584.

standing to pursue such relief. The *Crum* defendants and the United States argue to the contrary. In part, the *Crum* defendants assert that Rule 71 does not provide an avenue for the *Crum* plaintiffs to seek relief under *Frazer* because persons may never seek to enforce decrees in proceedings to which they are not a party. This is, of course, a threshold question. As the court explains below, the *Crum* defendants are mistaken.

The position urged by the *Crum* defendants is not supported by law apposite to the enforcement of injunctions under Rule 71. The cases upon which the defendants rely, *see, e.g., Tucker v. Troy State University*, 2000 WL 639342 (M.D.Ala.2000); *Salter v. Douglas MacArthur State Technical College*, 929 F.Supp. 1470 (M.D.Ala.1996); *Sims v. Montgomery County Comm'n*, 873 F.Supp. 585 (M.D.Ala.1994), are of limited relevance to resolving the instant question and are not controlling. These cases all held that a non- party did not have standing to seek enforcement of consent decrees to which he or she was not a party. However, none of these cases addresses Rule 71, and all of them draw on law from the Sixth Circuit Court of Appeals, *e.g., Aiken v. City of Memphis*, 37 F.3d 1155 (6th Cir.1994); *Jansen v. City of Cincinnati*, 977 F.2d 238 (6th Cir.1992) and Supreme Court precedent, *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 750, 95 S.Ct. 1917, 1932, 44 L.Ed.2d 539 (1975), that did not apply or interpret Rule 71. Other circuits, including the Eleventh Circuit Court of Appeals, have clearly held or implied that the Supreme Court's holding in Blue Chip Stamps should not be read broadly to prohibit enforcement of court orders by non-parties under Rule 71. *Barfus v. City of Miami*, 936 F.2d 1182, 1187 n. 18 (11th Cir.1991) (stating in dicta that non-parties might proceed under Rule 71 to enforce a consent decree entered in their favor); *see also Beckett v. Air Line Pilots Ass'n*, 995 F.2d 280, 287-89 (D.C.Cir.1993); *Hook v. Arizona*, 972 F.2d 1012, 1014-15 (9th Cir.1992); *Washington Hosp. v. White*, 889 F.2d 1294, 1299 (3d Cir.1989); *Berger v. Heckler*, 771

F.2d 1556, 1565 (2d Cir.1985); *Gautreaux v. Pierce*, 743 F.2d 526, 533 (7th Cir.1984).

This court agrees with the Second and Ninth Circuits which have held explicitly that the Supreme Court's decision in *Blue Chip Stamps* was not intended to preclude non-parties from seeking to enforce court orders where otherwise authorized by the Federal Rules of Civil Procedure, *Hook*, 972 F.2d at 1014-15; *Berger*, 771 F.2d at 1565, and the court believes that this holding is supported by the Eleventh Circuit's position in *Barfus*.

Thus, the *Crum* defendants are mistaken that Rule 71 may never serve as a basis for a non-party to enforce court orders. The court must therefore determine whether Rule 71 authorizes the *Crum* plaintiffs to seek relief under *Frazer*.

A. Contempt Proceedings

Before the court turns to the task of interpreting the reach of Rule 71, however, a brief detour through the law that governs contempt proceedings is necessary. [12] Civil-contempt sanctions enable a court to enforce compliance with its orders and to compensate a party for losses sustained as a result of non-compliance. *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 443, 106 S.Ct. 3019, 3033, 92 L.Ed.2d 344 (1986); *Jove Eng'g, Inc. v. IRS*, 92 F.3d 1539, 1547 n. 6 (11th Cir.1996). The ability to issue civil-contempt orders is an inherent power of federal courts. *Citronelle-Mobile Gathering, Inc. v. Watkins*, 943 F.2d 1297, 1301 (11th Cir.1991). The decision to impose sanctions for a party's contemptuous conduct is discretionary, *e.g., McGregor v. Chierico*, 206 F.3d 1378, 1383 (11th Cir.2000), but if sanctions are imposed, the court must have found that they are warranted based on clear and convincing evidence. *E.g., id.*

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[12] The court notes that the parties have focused on the question of the reach of Rule 71 and have neglected the question of whether the ambit of law that governs civil-contempt proceedings is wide enough to encompass the *Crum* proceeding.

Although civil sanctions are discretionary, the law is not silent as to the circumstances in which it is appropriate for a district court to exercise its discretion to permit a litigant to seek sanctions. The former Fifth Circuit held that the most appropriate litigants to bring contempt proceedings were the parties that litigated the case in which the court entered the order to be enforced. Southern Ry. Co. v. Lanham, 403 F.2d 119, 125 (5th Cir.1968) ("Civil contempt is 'wholly remedial,' serves only the purpose of a party litigant, and is intended to coerce compliance with an order of the court or to compensate for losses or damages caused by noncompliance.");[13] *Northside Realty Assocs., Inc. v. United States*, 605 F.2d 1348, 1356 (5th Cir.1979) ("While we need not foreclose altogether the possibility of third party compensatory relief in civil contempt cases, we agree with the District Court that [such relief] ought not to be granted here."). These precedents establish a clear rule that the circumstances in which third parties may enforce court orders through civil-contempt proceedings are limited and that such proceedings are disfavored. *Id.*

The precedent that most clearly developed the contours of this position is *Northside Realty*. There, the United States sought to recover compensatory damages for individuals whose rights were violated by a real-estate corporation that was bound by an injunction prohibiting racially discriminatory housing practices. 605 F.2d at 1350. The United States prosecuted the original case in which an injunction against the real-estate corporation was entered. The government subsequently sought damages for the non-parties against whom the real-estate corporation had allegedly

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[13] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), the Eleventh Circuit Court of Appeals adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

discriminated. Although the Eleventh Circuit found that the real-estate corporation had violated the district court's injunction, it held that compensatory damages through civil-contempt proceedings were unavailable to the non-party individuals whose rights had been violated. *Id.* at 1358. The appellate court summarized its holding as follows: "[T]he Government may not be awarded compensatory damages for nonparties in a civil contempt action brought to enforce a[n] ... injunction. The problems are substantial. The need is not. Absent express congressional mandate, this Court will not aid the building of such a house of cards." *Id.*

The Eleventh Circuit noted a number of factors that weighed in favor of its determination: (1) the relief sought "cannot be characterized as merely an incidental part of the main cause," *id.* at 1357; (2) permitting the relief "would in effect transform the civil contempt proceeding into a representative class action," *id.*; (3) the relief sought would raise "difficult questions concerning the collateral estoppel or res judicata effect to be given to findings raised by the Court in the contempt proceeding and in any subsequent proceeding or proceedings that might be had to determine the amount of damages to be awarded an individual discriminate," *id.*; and (4) other relief is available that is essentially the same as the relief sought in the contempt proceedings. *Id.* at 1357-58 ("Finally, we point out that there is no compelling need for the relief sought by the Government. Congress has authorized a private Title VIII cause of action whereby private plaintiffs may obtain injunctive relief, compensatory damages, and attorney' fees.... Since Congress has authorized an adequate remedy for individual victims of housing discrimination, we see no reason to imply another one.").

*Northside Realty* is, of course, not identical to the litigation currently before the court. Unlike the cases at bar, it involved questions of discrimination in housing, not employment discrimination. It involved the government seeking enforcement of an injunction for the benefit of non-parties rather than non-parties seeking to enforce an

injunction won by the United States. It directly addressed the propriety of monetary sanctions rather than other civil sanctions. And, finally, it nowhere directly based its reasoning on Rule 71.

Despite the differences between the situation in *Northside Realty* and that that confronts this court, the concerns that governed the Eleventh Circuit's ruling are materially relevant to these proceedings. Each of the considerations that militated against the pursuit of contempt proceedings in *Northside Realty* is present in the *Crum* litigation. First, Congress has authorized specific and wholly adequate remedial schemes for the species of discrimination alleged by the *Crum* plaintiffs: Title VII, '1981, and' 1983. Indeed, the *Crum* plaintiffs have framed their complaints in terms of these remedial schemes. Second, coming more than 20 years after the entry of the *Frazer* injunctions, the material facts and circumstances of *Crum* litigation cannot in any way fairly be said to be "incidental" to the factual questions litigated in *Frazer*.[14] There is, so to speak, considerable water under the bridge since the relief in *Frazer* was ordered. The *Crum* plaintiffs have already indicated that they will seek to prosecute this action as a class action, and the court has already set schedules and deadlines for considering the issues of class certification. There is no doubt that the course of action proposed by the *Crum* plaintiffs "would ... transform the civil contempt proceeding into a representative class action." 605 F.2d at 1357. Finally, it is plain that the question of the application of the doctrines of collateral estoppel and res judicata will be raised and will be central to the contempt proceedings.

Because each of the factors that precluded awarding contempt sanctions in *Northside Realty* is present (indeed,

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[14] Of course, the age of a case is not a bar to a party who may properly seek to enforce a court's ruling. *Florida Ass'n for Retarded Citizens*, 246 F.3d at 1298.

central) to the proposed contempt proceedings in *Crum*, it is clear that absent some intervening authority, the *Crum* plaintiffs may not enforce the *Frazer* orders through contempt proceedings. In light of this determination, the issue before the court is whether Rule 71 provides the requisite intervening authority.

B. Federal Rule of Civil Procedure 71

Federal Rule of Civil Procedure 71 provides:

> When an order is made in favor of a person who is not a party to the action, that person may enforce obedience to the order by the same process as if a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, that person is liable to the same process for enforcing obedience to the order as if a party.

The *Crum* plaintiffs argue that this rule authorizes them to seek enforcement of the relief granted in *Frazer* because the *Frazer* orders were entered "in favor of" African-Americans who are employed by, or interested in being employed by, the *Crum* defendants. The *Crum* defendants and the United States contend that Rule 71's "in favor of" provision may not be read as a broad grant of authority to non-parties to enforce the *Frazer* orders in the *Crum* litigation. Of course, the question before the court involves construing only the provision of Rule 71 that permits a non-party to enforce court orders against a party.[15] As stated, the question is whether Rule 71 provides independent authority for the *Crum* plaintiffs to seek sanctions for contempt against the *Crum* defendants based on the orders entered in *Frazer*. At its heart, this is a matter of the proper interpretation of Rule 71.

The canons of textual interpretation are long-settled. The court must begin with the language of the provision

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[15] The complex questions of due process that are inherent in the enforcement of an order against non-parties have little or no bearing on the court's analysis.

itself. *E.g., Federal Reserve Bank of Atlanta v. Thomas*, 220 F.3d 1235, 1239 (11th Cir.2000) ("the starting point for all statutory interpretation is the language of the statute itself"). If the provision speaks with clarity to an issue, then under all but the most extraordinary circumstances judicial inquiry as to the provision's meaning "is finished." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475, 112 S.Ct. 2589, 2594, 120 L.Ed.2d 379 (1992). However, where a provision is ambiguous, the court must look beyond the text to other sources that are evidence of the meaning of the provision. *E.g., Thomas*, 220 F.3d at 1239 ("If the statutory language is ambiguous, however, courts may examine extrinsic materials, including legislative history, to determine Congressional intent."); *see also Halperin v. Regional Adjustment Bureau, Inc.*, 206 F.3d 1063, 1067 (11th Cir.2000).

Rule 71's "in favor of" provision is ambiguous: it may be read broadly to reach classes of incidental beneficiaries or it may be read more narrowly to reach situations in which an order provides a specific benefit to readily identifiable individuals. The text of the rule itself does not resolve this issue. Thus, the court must seek guidance from extrinsic sources to determine the contours of the right of enforcement provided by Rule 71. Thomas, 220 F.3d at 1239; Halperin, 206 F.3d at 1067.

1. The History of Rule 71

The court looks first to the history of the rule. Clio rarely answers questions about the past directly or unambiguously. Her songs, though beguiling, are notoriously subject to conflicting interpretations. Nonetheless, Rule 71's history, on the whole, indicates that it was intended to enable clearly discernible and direct non-party beneficiaries to enforce specific rights and benefits conferred by court orders. Rule 71 was adopted in 1937 and has been

amended once since then, in 1987.[16] Fed.R.Civ.P. 71, Advisory Committee Notes. The rule is a rewording of former Equity Rule 11, which enabled a non-party to enforce orders made in his "favor ... by the same process as if he were a party" and made a non-party against whom an order was entered to "be liable to the same process for enforcing obedience to such orders as if he were a party." Rules of Practice for the Courts of Equity of the United States, Rule 11, 226 U.S. 649, 652 (1912).[17]

The history of Equity Rule 11 is marked by few reported cases. Those cases, however, reveal that Rule 11 was applied narrowly. For instance, *Farmers' Loan & Trust Co. v. Chicago & A. Ry. Co.*, 44 F. 653 (C.C.D.Ind.1890), involved a sale on the foreclosure of a railroad mortgage; the court directed its receiver to turn over possession of the railroad to the purchaser's assignee, the *Chicago & Erie Company*. The court reserved the right to resume possession if the assignee failed to pay the purchase price into the court. 44 F. at 654-659. The *Chicago & Erie Company* petitioned the court to exclude another rail company, the Wabash Company, from a stretch of rail. *Id.* at 658. The Wabash Company objected that *Chicago & Erie* could not invoke the assistance of the court. The court held otherwise, finding that *Chicago & Erie* was able to request relief under the identical predecessor to Rule 11. *Id.* at 659. The application of the equity rule, however, was narrow: the party in whose favor the order was

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[16] The Advisory Committee notes indicate that the 1987 amendment was technical and not substantive. *See* Fed. R. Civ. P. 71, Advisory Committee Notes.

[17] The complete text of Rule 11 provides: "Process in Behalf of and Against Persons Not Parties. Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, may enforce obedience to such order by the same process as if he were a party; and every person, not being a party, against whom obedience to any order of the court may be enforced, shall be liable to the same process or enforcing obedience to such orders as if he were a party."

entered had been specifically identified and its rights and obligations had been clearly defined and circumscribed.

In *Robert Findlay Manufacturing Co. v. Hygrade Lighting Fixture Corp.*, 288 F. 80 (S.D.N.Y.1923), the court applied Equity Rule 11 to pierce the corporate veil to permit the special master on the case to recover his fees against the owners of the defendant corporation. 288 F. at 80. The court reasoned that, under Equity Rule 11, it had the power to enforce an order requiring the payment of fees against the owners. *Id.* at 81. The court's decision applied the provision of the rule permitting an order to be enforced against a non-party, rather than determining the scope of who might be able to enforce the order itself. *Id.* at 80. Nonetheless, the decision suggests a relatively narrow scope and purpose for the application of the rule: the court determined that the interests of the non-party individuals against whom the court enforced its order were "so closely connected with the [party] defendant" as to be almost "identical." *Id.*

Rule 11, thus, appeared neither to permit broad process against non- parties, nor to permit non-parties broadly to invoke equitable intervention. Courts that construed Rule 11 required a substantial confluence of interests between the non-party and the party, or clear specification in the order of non-parties who might proceed under Rule 11. This court has been able to find no case that construes the scope of Equity Rule 11 as broadly as the *Crum* plaintiffs here propose, to reach any beneficiary of an order; nor has the court, cognizant of the differences in federal litigation between the late nineteenth and early twentieth centuries and today,[18] found equity cases that would suggest that such a broad application was envisioned.

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[18] Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 Cornell L. Rev. 270 (1989); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. Pa. L. Rev. 909 (1987); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. Chi. L. Rev. 494

This understanding appears to be shared by the drafters of Rule 71. The advisory committee notes to Rule 71 do not explicitly indicate that the scope of Equity Rule 11 was meant to define the scope of Rule 71, but the notes cite a number of Rule 11 cases as guidance. Fed.R.Civ.P. 71, Advisory Committee Notes; *see also Terrell v. Allison*, 88 U.S. (21 Wall.) 289, 22 L.Ed. 634 (1874); *Farmers' Loan*, 44 F. at 653; *Hygrade Lighting Fixture*, 288 F. at 80, *Thompson v. Smith*, 23 F. Cas. 1093 (C.C.D.Minn.1870) (No. 13,977). Of course, two of these cases, *Farmers' Loan* and *Hygrade Lighting Fixture*, as stated, interpreted Rule 11 or its predecessor Rule 10. Terrell and Thompson, like *Hygrade Lighting Fixture*, are not cases about who may enforce a court order, but against whom such an order may be enforced, and do not address the question of when a non- party may enforce a court order.

Thus, the historical background against which Rule 71 was drafted and the terms in which its authors understood its application strongly suggest that the provision was intended to enable non-parties to pursue relief in court in circumstances where they had been specifically identified as beneficiaries of an order. Of course, that history is not necessarily controlling. The nature of litigation in federal courts has evolved greatly since 1937, particularly as regards what is generally known as public-law litigation.[19] Nonetheless, the history of the rule counsels against extending it as far as the *Crum* plaintiffs here desire.

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(1986). There is considerable authority for the proposition that the earlier decisions that were grounded in Rule 11 and private-law conceptions of litigation are of limited value in addressing modern institutional litigation, in which public and private rights are primarily at issue, and in which injury is only partially compensable in monetary terms. Doug Rendleman, *Compensatory Contempt: Plaintiff's Remedy When a Defendant Violates and Injunction,* 1980 U. Ill. L.F. 971, 976-77.

[19] For more detailed discussions of the development of public-law litigation and the history of the Federal Rules of Civil Procedure, see the articles cited *supra* note 14.

2. Judicial Interpretations of Rule 71

Bearing the history of Rule 71 in mind, the court turns to the decisions that have construed Rule 71. None of the judicial decisions that have construed the rule resolves the question of how far the scope of the "in favor of" provision should reach.

Most of the decisions that have interpreted Rule 71 have done so in the context of proceedings brought to enforce consent decrees. *E.g., Rafferty v. NYNEX Corp.*, 60 F.3d 844 (D.C.Cir.1995); *Beckett v. Air Line Pilots Ass'n*, 995 F.2d 280 (D.C.Cir.1993); *Berger v. Heckler*, 771 F.2d 1556 (2d Cir.1985). Such cases are only of limited use in addressing the question before the court. A crucial task in interpreting consent decrees is ascertaining how the parties intended to delineate who might fall within the range of persons who might invoke it. *E.g., Reynolds*, 202 F.3d at 1316 (applying canons of contract interpretation to interpreting a consent decree). As the Second Circuit Court of Appeals has aptly stated, "consent decrees are a hybrid in the sense that they are at once both contracts and orders; they are construed largely as contracts but are enforced as orders." *Berger*, 771 F.2d at 1567-68. Thus, the parties to a consent decree are free, within the limits that the law provides, to indicate beneficiaries, create zones of interest for the decree's enforcement, and specify how relief may be sought for violations of the decree. Thus the court must reject the argument of the United States that Rule 71 does not extend to permit private, non-party enforcement of orders entered in cases litigated by the United States. The cases on which the government relies to support this contention are cases in which courts were faced with the task of construing consent decrees.[20] *E.g., SEC v. Prudential Securities, Inc.*, 136 F.3d

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[20] In part, the argument of the United States notes that the interests of the government in pursuing civil-rights litigation may well be different from the interests of private individuals in such litigation. Moreover, the United States contends that the public purpose behind such government action

153, 158 (D.C.Cir.1998). However, the Prudential Securities case rejected such a construction of Rule 71. The court stated that "the fact that the government is involved is not in itself fatal to a third party enforcement action." *Id.*

As the *Crum* plaintiffs correctly argue, court orders entered after a trial on the merits are not the product of agreement by the parties, but indicate, rather, that agreement was not reached and a judicial resolution of the conflict was needed. The *Frazer* orders that the private plaintiffs seek to enforce are examples of the latter species of decree, not the former. The *Crum* plaintiffs correctly note that the Prudential Securities court decided that case on contract principles as applied to consent decrees. Cases that turn on the judicial interpretation of consent decrees as contracts are not dispositive of the issue before the court. *Berger*, 771 F.2d at 1567-68.

The cases that have confronted the question of the scope of Rule 71 outside the context of consent-decree enforcement, however, indicate some parameters in how Rule 71 may be construed. It is clear that Rule 71 does not confer standing upon non-parties to pursue relief that they would not have been able to seek had they been parties. *Moore v. Tangipahoa Parish School Bd.*, 625 F.2d 33, 34 (5th Cir.1980) (Rule 71 cannot be adopted by one to enforce an order in an action in which the non-party has no standing to sue); *Lasky v. Quinlan*, 558 F.2d 1133 (2d Cir.1977) (Rule 71 cannot be used by a party to enforce an order in an action in which the party no longer has standing to sue).

The *Crum* plaintiffs, relying on *Tangipahoa*, urge the court to conclude that article III standing is the only relevant

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should not be permitted to be subordinated to the interests of private parties, who may seek to enforce orders entered in such proceedings in ways that may conflict with the overriding public interests pursued by the United States.

consideration in determining the reach of Rule 71. They argue that, if a non-party falls within the zone of interests sufficient to establish article III standing, then Rule 71 provides authority to seek enforcement of an order.[21] By this reasoning, the "in favor of" provision of Rule 71 is simply a proxy for standing. This argument, while superficially appealing, is logically flawed. It is indisputable that a party must have standing in order to institute any judicial proceedings in federal court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573, 112 S.Ct. 2130, 2143, 119 L.Ed.2d 351 (1992)(holding that standing is a requirement for a case or controversy under article III). However, it does not follow that the contours of Rule 71 are coterminous with the limits of standing: simply because a non-party may have standing under the Constitution does not mean that he or she may proceed under Rule 71. Thus, *Tangipahoa* states the obvious and stands for the uncontroversial proposition that standing is a prerequisite to proceeding under Rule 71. *Tangipahoa* cannot be read for the conclusion that article III standing is all that is required to seek to enforce a court order under Rule 71.

Based on the precedents construing Rule 71, this court agrees with the D.C. Circuit that "the precise contours of Rule 71 ... remain unclear." *Beckett*, 995 F.2d 280, 288 (D.C.Cir.1993). There is no clear judicial precedent that establishes, one way or the other, whether Rule 71's requirements are met by the *Crum* plaintiffs.

3. The Reach of Rule 71

An analysis of the history of Rule 71 and the relevant judicial decisions that have construed it in contexts analogous to the present litigation do not resolve the question of how narrowly or broadly the "in favor of" provision of Rule 71

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[21] The court notes that the United States concedes that at least some of the *Crum* plaintiffs appear to meet the requirements of the "zone of interests" prong of standing doctrine. *See* Response of the United States to Private Plaintiffs' Motion to Alter, Amend, or Reconsider Denial of Contempt Proceedings. (*Crum* Doc. no. 486; *Frazer* Doc. no. 601).

may be construed. As stated, the question that the court must answer is whether, in light of Eleventh Circuit precedent that counsels against permitting the *Crum* plaintiffs to go forward against the *Crum* defendants through civil-contempt proceedings, Rule 71 provides independent authority to so proceed. The court, based on the inconclusive history and precedent that define the doctrine of Rule 71, considers that the rule does not so provide.

It is a fundamental axiom of legal decision-making that courts should strive to avoid construing the law in a manner that creates or results in contradiction or conflict. This has most obviously been stressed in the interpretation of statutes. *E.g., Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974) (courts should strive to interpret statutes in a manner that avoids unnecessary conflict). However, this canon is equally applicable here. The provision of Rule 71 that is at issue is ambiguous. The court, absent clear authority, will not stretch its interpretation of an ambiguous rule of civil procedure so as to override established law of the Eleventh Circuit. Accordingly, the court concludes that the *Crum* plaintiffs' original motion for civil contempt was properly denied and that the *Crum* plaintiffs' motion to reconsider is without merit and will be denied.

For the reasons stated, it is ORDERED that the motion to alter, amend, or reconsider, etc., filed by the *Crum* plaintiffs on July 2, 2001 (*Crum* Doc. no. 465; *Frazer* Doc. no. 596), is denied.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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03-12305-FF

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2:68cv2709

UNITED STATES OF AMERICA,
Plaintiff,

EUGENE CRUM, JR., ROBERT L. SMITH, *et al.*,
Interested Parties-Appellants,

versus

THOMAS G. FLOWERS,
ALABAMA STATE EMPLOYEES, *et al.*,
Defendants-Appellees.

2:94cv356

EUGENE CRUM, JR., individually and on behalf of a class of similarly situated individuals, *et al.*,
Plaintiffs,

RODNEY HUNTLEY, GRANT CULLIVER,
Intervenors-Plaintiffs,

versus

STATE OF ALABAMA,
STATE OF ALABAMA DEPARTMENT OF EDUCATION, *et al.*,
Defendants,

FLORENCE/LAUDERDALE COUNTY EMERGENCY MANAGEMENT AGENCY, *et al.*,
Intervenor-Defendants.

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On Appeal from the United States District Court for the Middle District of Alabama

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BEFORE: ANDERSON and BLACK, Circuit Judges.

BY THE COURT:

As the Court has dismissed this appeal in part, to the extent that Appellants' notice of appeal evinced an intent to appeal from the *Crum* litigation, and as it appears that Appellants are not parties to the *U.S. v. Flowers* litigation, the parties are ORDERED to show cause within fourteen (14) days of the date of entry of this order why this appeal should not be dismissed for lack of standing. *See Reynolds v. Butts*, 312 F.3d 1247 (11th Cir. 2002).

(2)

Supreme Court, U.S.
FILED
MAY 7 - 2004
OFFICE OF THE CLERK

No. 03-1398

In the
# Supreme Court of the United States

EUGENE CRUM, JR., et al.,
*Petitioners,*

v.

THOMAS G. FLOWERS, et al.,
*Respondents.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Eleventh Circuit

## BRIEF IN OPPOSITION OF RESPONDENTS THOMAS G. FLOWERS, ET AL.

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May 7, 2004

BEST AVAILABLE COPY

## QUESTION PRESENTED

(Restated)

Whether, on the facts presented, the court of appeals correctly held that petitioners lacked standing to appeal the adverse judgment of the district court because petitioners were not parties to the underlying action?

## PARTIES TO THE PROCEEDINGS BELOW

In order to identify accurately the parties to the proceedings below, a preliminary explanation of those proceedings is required.

The style of the case set forth in the petition – *Crum v. Flowers* – is inaccurate and misleading. Petitioners are individual members of a putative (but as yet uncertified) plaintiff class in a pending private discrimination lawsuit commenced in 1994 and styled *Crum v. Alabama*, Civ. A. No. 94-T-356-N (M.D. Ala.). Respondents are defendants in an altogether separate enforcement proceeding commenced by the United States in 1968 and styled *United States v. Flowers*, Civ. A. No. 68-T-2709-N (M.D. Ala.) (previously styled and herein referred to as *United States v. Frazer*[1]). When the court of appeals entered the judgment order that is the basis of the present petition, petitioners (that is, the *Crum* plaintiffs) were neither parties to nor intervenors in *Frazer*; rather, they were strangers to *Frazer* whose lone formal act in that case had been to file the motion for contempt sanctions that underlies this appeal.

The status of the parties in the court below is as follows:

The plaintiff in the proceedings below, *United States v. Frazer*, is the United States.

Petitioners, who described themselves as "Interested Parties-Appellants" in the *Frazer* proceedings, include the following individuals and entities: Charles E. Archie, Jr.; Carolyn Ball; Carol Banks; David Barley; John Bradford; Milton Burton; Pauline Burton; Lynn Carter; Clyde Chatman; Preston Coleman; Betty Crum;

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[1] Although *United States v. Frazer* has been re-styled *United States v. Flowers* as a result of substitutions of the named defendants, respondents will refer to the case herein as the "*Frazer* case" or "*Frazer*."

Eugene Crum, Jr.; Grant Culliver; Jerome F. Dangerfield; Ethelene Duster; Venus Edwards; Mable G. Elliott; Andrey D. Finch; Samuel Foster; Lewis Gilchrist; Freddy Golthy; Terry Dale Goodson; Ricky Grider; Romanza A. Hamilton; Willie Harris; Michael Hopkins; Jacquelyn J. Jackson-Kelly; Yvonne C. Jennings; Gladys Jones; Theodore Jones; Willie Kelley; Deborah F. Lumpkin; Katherine Matthews; Roosevelt Mays, Jr.; Shirley Mays; Eddie G. McCoy; Robert E. Moore; Benny Newton; Herman Powell; Samuel L. Price; Pamela Ramos; Kenneth Rodgers; David Said; Geneice Smith; Robert L. Smith; Wanda Jackson Speights; Thornton Taylor; Ellen Tolbert; Earl Vaughn; Nonie Williams; John W. Winston; Tamblyn Witherspoon; Darrell Wright; Earnest Wright; and a putative class of black persons who are employed, have been employed, or who may in the future be employed by the State of Alabama and its agencies, boards, commissions and officials, the Florence/ Lauderdale County Emergency Management Agency, Lauderdale County, and the Lauderdale County Commission.

The respondents are as follows: State of Alabama, and its agencies, boards, commissions, and officials including Alcoholic Beverage Control Board; Board of Public Accountancy; Bureau of Tourism and Travel; Commission on Aging; Commission on Physical Fitness; Department of Agriculture and Industries; Department of Conservation and Natural Resources; Department of Corrections; Department of Economics and Community Affairs; Department of Education; Department of Finance; Department of Human Resources; Department of Industrial Relations; Department of Labor; Department of Mental Health and Mental Retardation; Department of Public Health; Department of Rehabilitation Services; Department of Revenue; Department of Voter Registration; Development Office; Emergency Management Agency; Thomas G. Flowers; Florence/ Lauderdale County Emergency Management Agency; Industrial Development Training Agency; Labor Board;

Lauderdale County; Lauderdale County Commission; Medicaid Agency; Retirement Systems of Alabama; Securities Commission; State Board of Registrars; State Docks; State Personnel Board; State Personnel Department.

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## OPPOSITION TO PETITION FOR WRIT OF CERTIORARI SEEKING SUMMARY REVERSAL

Respondents oppose the petition for a writ of certiorari to reverse summarily the judgment of the United States Court of Appeals for the Eleventh Circuit.

## OPINIONS BELOW AND JURISDICTION

The court of appeals' judgment order dismissing petitioners' appeal for lack of standing (Pet. App. 1a) is unpublished. The court of appeals' order to show cause why the appeal should not be dismissed for lack of standing (Pet. App. 20a-21a) is unpublished. The district court's order denying petitioners' motion for contempt sanctions (Pet. App. 2a-19a) is published at 213 F.R.D. 592 (M.D. Ala. 2003). The Court has jurisdiction under 28 U.S.C. §1254.

## RELEVANT STATUTORY PROVISION

Title 28, Section 1291 of the United States Code provides that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ."

## STATEMENT OF THE CASE

The tortured procedural history of this case, which is described in some detail below, does not lend itself to a brief or succinct recitation. However, for purposes of providing a preliminary frame of reference, that history, reduced to its most basic and necessary components, is as follows:

The current petition – somewhat misleadingly styled *Crum v. Flowers* – actually arises from two entirely separate lawsuits: The first, *Frazer* (now *Flowers*), is an enforcement action filed by the United States in 1968 against the State of Alabama and many of its agencies;

the second, *Crum*, is a private discrimination lawsuit commenced by petitioners in 1994 on behalf of a putative (but still uncertified) class of African-Americans against the State of Alabama and many of its agencies. Confusion arises because petitioners, who are the *Crum* plaintiffs but are not parties of record in *Frazer*, filed a motion for contempt sanctions in *Frazer* alleging that respondents had violated the *Frazer* injunctions. The district court, which has presided over both *Crum* and *Frazer* since their (separate) inceptions, denied petitioners' motion because, as nonparties, they lacked standing to enforce the *Frazer* injunctions. Petitioners appealed the district court's order to the Eleventh Circuit, which dismissed the appeal for lack of standing. It is that decision of the court of appeals that is the subject of the instant petition for certiorari.

## I. The Underlying Litigation

### A. The *Frazer* Enforcement Action

In 1968, the United States commenced the underlying action, *United States v. Frazer*, Civ. A. No. 68-T-2709-N (M.D. Ala.), against the State of Alabama and many of its boards, agencies, departments, and officials, alleging that they had engaged in racially discriminatory employment practices. In 1970, after a non-jury trial, the district court found in favor of the United States and entered an injunction prohibiting the State and its agencies from "engaging in any employment practices, including recruitment, examination, appointment, training, promotion, retention, or any other personnel action, for the purpose of or with the effect of discriminating against any employee, or actual or potential applicant for employment on the ground of race or color." *United States v. Frazer*, 317 F. Supp. 1079, 1090 (M.D. Ala. 1970).[2]

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[2] In a subsequent proceeding, the court entered additional injunctive relief. *See United States v. Frazer*, No. 68-T-2709-N, 1976

Contrary to the petition's dramatic and sometimes inflammatory rhetoric,[3] this case does not concern the segregated South of the 1950s. By all accounts, the State has made tremendous progress regarding the hiring and promotion of African-American candidates, as well as other employment practices, since the issuance of the first *Frazer* injunction in 1970. The *Frazer* court has not found the State in violation of the injunctions in over 20 years; on the contrary, as early as 1982 the district court noted the State's "progress in providing equal employment opportunities in merit system positions to black citizens of Alabama." *Frazer/Ballard* Order at 2 (June 29, 1982). Perhaps most tellingly, even the original *Frazer* plaintiff, the United States, which has monitored compliance with the *Frazer* injunctions during the 34 years of their existence, has emphasized the State's progress. The United States recently joined the State of Alabama in moving the district court to terminate certain specific mandates of the *Frazer* injunctions based on its determination that the discriminatory practices that had initially required the implementation of a so-called "no-bypass" rule[4] have ceased and that the effects of such practices have been remedied. (Accordingly, while petitioners are technically correct that the *Frazer* injunction "remains in effect today," Pet. at 2, that assertion – without any reference to the United States' recent efforts to lift important parts of that injunction – tells only part of the story.)

The State of Alabama, of course, does not claim to

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WL 729 (M.D. Ala. Aug. 20, 1976). The 1970 and 1976 injunctions are collectively referred to as the "*Frazer* injunctions."

[3] The petition, for instance, refers to the "document[ation]" of the State's "ongoing refusal to comply" with court orders but cites only 28- and 34-year-old court decisions as support. Pet. at 1.

[4] The "no-bypass" rule refers to a core provision of the *Frazer* injunction prohibiting an appointing authority from selecting a lower-ranking white candidate over a higher-ranking African-American candidate from the list of eligible candidates for a given position.

have successfully rooted out every last vestige of individual discrimination; that is and will remain an ongoing effort. But recognition of the State's substantial progress both by the court in which *Frazer* has been pending for 34 years and by the original party plaintiff to that action belies petitioners' dramatic descriptions of allegedly unaddressed and rampant race discrimination.

### B. The *Crum* Lawsuit

Petitioners, who are individual plaintiffs in a separate private lawsuit, *Crum v. Alabama*, Civ. A. No. 94-T-356-N (M.D. Ala.), are African-Americans claiming that they have suffered discrimination at the hands of the State of Alabama, its agencies, departments, subdivisions, and individual and official agents. Many of the *Crum* defendants are also defendants in *Frazer*. Contrary to the petition's representation (Pet. at 2), petitioners are *not* members of a "class" in *Crum*, and, indeed, no plaintiff class has been certified in that case. To the contrary, on June 21, 2001, the district court denied petitioners' motion for class certification in *Crum*. *See* Order Denying Plaintiffs' Motion for Class Certification With Leave To Renew (June 21, 2001).[5]

In 1997, over the State's objection, for reasons of convenience and judicial economy, the district court consolidated the *Frazer* and *Crum* cases "to the extent that there are issues common to both." Order Regarding Consolidation at 1 (Sept. 17, 1997). The consolidation did not of its own force make petitioners parties to the *Frazer* case or its injunctions. *See Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933) ("[C]onsolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single

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[5] Although the district court's June 21, 2001, order denying petitioners' motion for class certification granted them leave to renew their motion at a later date, the district court has not certified a plaintiff class or conducted a class certification hearing, and no hearing date is currently set.

cause, or change the rights of the parties, or make those who are parties in one suit parties in another."); *see also Farese v. Scherer*, 342 F.3d 1223, 1228 (11th Cir. 2003) (citing *Johnson*). Furthermore, several years later, the district court for all practical purposes deconsolidated the two cases when it dismissed from the *Crum* litigation all of petitioners' claims based on alleged violations of the *Frazer* injunctions (although, to be fair, it did so "without prejudice to the rights of an appropriate person or entity to file a motion for contempt"[6]). Thus, in sum, petitioners did not become parties to *Frazer* via the limited initial consolidation of *Frazer* and *Crum*, and any suggestion to the contrary was rebutted when the district court dismissed the *Frazer* claims that petitioners had asserted in the *Crum* litigation.

On the same day the district court effectively deconsolidated the two cases, and without seeking to intervene in the underlying *Frazer* litigation, petitioners filed in both *Crum* and *Frazer* a consolidated motion seeking contempt sanctions. *See* Motion To Show Cause Why Defendants Should Not Be Held in Contempt of Court (Apr. 5, 2001).[7] This consolidated motion (the beginning of petitioners' attempt to hybridize the *Crum* and *Frazer* cases, which culminates in the confusing *Crum v. Flowers* style of this case) sought an order requiring the State in both actions to show cause why it should not be held in contempt of the *Frazer* injunctions. Petitioners' contempt motion purported to be based on Federal Rule of Civil Procedure 71, which provides in pertinent part: "When an order is made in favor of a

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[6] Order Regarding Dispositive Motions at 2 (Apr. 5, 2001).

[7] Only recently – on February 26, 2004 – did the district court grant petitioners the right to intervene in *Frazer*. *See* Order Regarding Intervention (Feb. 26, 2004). A subsequent discovery order limited the scope of the litigation in intervention to the question whether the no-bypass rule should be terminated, as both the State of Alabama and the United States argued it should. *See* Discovery Order at 4-5 (Apr. 7, 2004).

person who is not a party to the action, that person may enforce obedience to the order by the same process as if a party ...." In their responses to the consolidated motion, both the State of Alabama and the United States argued that Rule 71 did not apply and that petitioners lacked standing to enforce the *Frazer* injunctions in either the *Crum* or *Frazer* cases.

On June 19, 2001, the district court entered a joint order denying petitioners' contempt motion in the *Crum* and *Frazer* cases "[f]or essentially the reasons given by the United States in its statement filed on May 8, 2001," that is, because Rule 71 did not apply and petitioners lacked standing to enforce the *Frazer* injunctions. Order Denying Motion for Civil Contempt at 1 (June 19, 2001). On July 2, 2001, Petitioners filed a motion to alter, amend, or reconsider the district court's order. The district court denied that motion, with opinion, on March 28, 2003. Pet. App. 2a-19a.

### C. Proceedings in the Eleventh Circuit

Presumably because they had sought contempt sanctions against the State in a consolidated motion filed in both *Crum* and *Frazer*, petitioners also filed a consolidated notice of appeal in both cases on April 28, 2003. On May 28, 2003, the court of appeals issued an order regarding the consolidated appeal in which it raised an issue concerning the court's appellate jurisdiction, in particular, "[w]hether the district court's March 28, 2003, order denying plaintiffs' motion to alter, amend or reconsider the court's prior order denying the plaintiffs' motion for contempt is immediately appealable." Jurisdictional Question (May 28, 2003). At this juncture in the litigation, the Eleventh Circuit restored the *Crum* and *Frazer* cases to their appropriately separate paths.

With respect to *Crum*, on October 24, 2003, after briefing by the parties, the Eleventh Circuit dismissed petitioners' appeal of the district court's March 28, 2003, judgment for lack of jurisdiction, finding that the subject order was not final. *See* Order Dismissing Appeal at 2

(Oct. 24, 2003). On March 11, 2004, petitioners sought permission to appeal the district court's March 28 order interlocutorily pursuant to 28 U.S.C. §1292(b) in the context of both the *Crum* and *Frazer* cases. On April 12, 2004, the court of appeals denied petitioners' request. *See* Order Dismissing Petition To Appeal at 2 (Apr. 12, 2004). The court of appeals' rulings in the *Crum* litigation are not before this Court.

With respect to *Frazer* – at issue here – on October 24, 2003, the Eleventh Circuit issued an order requiring petitioners to show cause why the appeal should not be dismissed for lack of standing. Pet. App. 20a-21a. After receiving the parties' briefs,[8] the court of appeals issued a one-line unpublished judgment order dismissing petitioners' appeal in *Frazer* for lack of standing: "As Appellants are not parties to the *U.S. v.* [*Frazer*] litigation, this appeal is DISMISSED for lack of

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[8] Petitioners' assertion that respondents "did not contest the standing of petitioners to appeal" in the Eleventh Circuit (Pet. at 4) is inaccurate. Respondents expressly argued there that petitioners' "appeal should be dismissed." Resp. C.A. Br. 14. To be sure, "for purposes of [their] response" to the Eleventh Circuit, respondents were willing to "assume" that "if Rule 71 applied and the Crum Plaintiffs otherwise had standing to file their contempt motion, they also should be regarded as having standing to appeal." *Id.* at 4. Respondents made that "assum[ption]," however, only because they pressed a different, alternative argument – namely, that because petitioners, as plaintiffs in *Crum*, lacked standing to move the district court for contempt sanctions against respondents in the *Frazer* litigation in the first place, they also had no standing to appeal in *Frazer*. *See id.* ("[T]he district court's standing and Rule 71 analysis should apply equally to the [appellate standing] issue raised by this Court's jurisdictional question.").

In any event, it is established that the issue of standing is not subject to waiver and that an appellate court is required to address the issue without regard to how (or whether) the issue was raised below. *See* Fed. R. Civ. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."); *see also United States v. Hays*, 515 U.S. 737, 742 (1995); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990).

standing." Pet. App. 1a.

From that unpublished judgment order, petitioners on April 5, 2004, sought the instant writ of certiorari from this Court.

## REASONS FOR DENYING THE WRIT

Before diving into the merits of petitioners' arguments, two important preliminary observations are in order. *First*, petitioners' second "Question Presented" – a discussion of which actually occupies the better part of the petition (Pet. at 10-16) – is not really presented at all. That question, and the whole of Part II of the petition, concerns the meaning and scope of Federal Rule of Civil Procedure 71 – namely, whether Rule 71 permits unnamed non-party beneficiaries of a court order to enforce the order through contempt sanctions or otherwise. *That* question, petitioners contend, has divided the circuits and warrants this Court's review. But, as petitioners rightly concede (Pet. at 10), *that* question is not presented here. The Eleventh Circuit did not address Rule 71 – and, indeed, one of the chief reasons petitioners seek summary reversal of the Eleventh Circuit's judgment (of which more below) is to "force" that court to weigh in on what petitioners view as the real issue here. Pet. at 5.

*Second*, with respect to the only issue that really *is* presented here – whether the Eleventh Circuit was correct to dismiss petitioners' appeal on standing grounds – petitioners have essentially (and, again, correctly) acknowledged that it involves no "certworthy" question. Conspicuously, petitioners have not asked the Court to grant certiorari and set this case for briefing and argument. Instead, petitioners have sought only the extraordinary remedy of summary reversal. *See* Pet. at 5, 6, 10, 16.

Petitioners seek summary reversal on the ground, they say, that the Eleventh Circuit's decision denying

their standing to appeal – embodied in a one-line unpublished judgment order – "directly contravenes Supreme Court precedent." Pet. at 6. With respect, petitioners are wrong. The court of appeals followed settled law in dismissing petitioners' appeal for lack of standing. In particular, the decision below is consistent with the general principle, embraced by this Court's holdings, that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment.

As petitioners themselves correctly recognize (Pet. at 10), summary reversal is reserved for "demonstrably erroneous application[s] of federal law." *Maryland v. Dyson*, 527 U.S. 465, 467 n.1 (1999). For the reasons explained below, the Eleventh Circuit's decision is not erroneous, let alone "demonstrably erroneous." Accordingly, and because by petitioners' own admission there is no basis for granting certiorari and setting the case for briefing, this Court should simply deny the petition.

**Summary Reversal Is Unwarranted In This Case Because The Court of Appeals Followed Settled Law In Dismissing Petitioners' Appeal For Lack of Standing.**

Again, the Eleventh Circuit did not say anything one way or the other about the meaning, scope, or application of Rule 71. Instead that court's one-line unpublished judgment order dismissed petitioners' appeal on the sole basis that they were not parties to the underlying litigation and therefore lacked standing to appeal the district court's judgment: "As Appellants are not parties to the *U.S. v.* [*Frazer*] litigation, this appeal is DISMISSED for lack of standing." Pet. App. 1a. The court of appeals' judgment is consistent with the principle, as articulated by this Court, "that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Marino v. Ortiz*, 484 U.S. 301, 304 (1988). *See also United States ex rel. Louisiana*

*v. Jack*, 244 U.S. 397, 402 (1917); Fed. R. App. P. 3(c) ("A notice of appeal must ... specify the *party* or *parties* taking the appeal.") (emphasis added); Restatement (Second) of Judgments § 34(1) (1980) ("A person who is named as a party to an action and subjected to jurisdiction of the court is a party to the action.").

1. *Marino v. Ortiz*, 484 U.S. 301 – which petitioners relegate to a footnote (Pet. at 9 n.4) – is for all intents and purposes on point here. The Court there addressed the issue whether police officers who were not parties to a Title VII lawsuit against the City of New York could challenge a consent decree settling that suit. Although the officers had objected to the settlement at the fairness hearing, they had not formally moved to intervene. This Court affirmed the Second Circuit's decision that "because petitioners were not parties to the underlying lawsuit, and because they failed to intervene for purposes of appeal, they may not appeal from the consent decree approving that lawsuit's settlement." *Id.* at 304. In so holding, the Court reiterated and built upon the long-standing rule that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Id.*

The same result – that is, no standing to appeal – follows here. When the district court entered its order in the instant case (March 28, 2003), petitioners were not parties to the underlying *Frazer* litigation and had not sought to intervene in that action. Nor had petitioners intervened in the *Frazer* litigation for any purpose as of the date they filed their notice of appeal from the district court's judgment (April 28, 2003), or even as of the date the Eleventh Circuit dismissed their appeal (December 5, 2003).[9] Instead, at all relevant times petitioners were

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[9] Later (on February 26, 2004), petitioners were permitted to intervene in *Frazer*. *See supra* at 5 n.7. But it is well-established that an individual's standing to appeal turns on his status before the district court at the time the challenged judgment was entered. *See*

merely putative class members in an altogether separate discrimination case (*i.e.*, *Crum*) pending before the same district court. The United States – not petitioners or their privies – commenced the underlying enforcement action (*i.e.*, *Frazer*) in 1968 and remained the sole named party-plaintiff for 34 years.

Under the rule of *Marino v. Ortiz*, petitioners, as legal strangers to the *Frazer* litigation, lacked standing to appeal.

2. Petitioners argue that *Devlin v. Scardelletti*, 536 U.S. 1 (2002), requires a different result. More accurately, petitioners assert that *Devlin* so clearly requires a different result that it was "demonstrably erroneous" for the Eleventh Circuit to follow *Marino* and that summary reversal is thus warranted. Again, petitioners are wrong. *Devlin*, which as explained below dealt specifically with the mandatory class-action context, is distinguishable; this Court's decision in *Marino* remains controlling law with respect to non-class cases like this one.

In *Devlin*, a class of retired pension-plan participants attempted to prevent the trustees of the plan from eliminating a cost-of-living adjustment. 536 U.S. at 4. After objecting to a settlement between the class and the adverse parties, one absent class member attempted to appeal the trial court's approval of the settlement. *Id.* at 4-6. The court of appeals held that because the absent

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*Credit Francais Int'l, S.A. v. Bio-Vita, Ltd.*, 78 F.3d 698, 704 (1st Cir. 1996) (citing, *e.g.*, 9 Moore's Federal Practice ¶203.16 (2d ed. 1991)); *I.C.C. v. Holmes Transp. Inc.*, 983 F.2d 1122, 1125 n. 4 (1st Cir. 1993). Typically, this means that the party appealing must have been a party of record at the time the judgment was entered, including by way of intervention, substitution, or third-party practice. *See Matter of VMS Ltd. P'ship Sec. Litig.*, 976 F.2d 362, 366 (7th Cir. 1992) (citing Moore's); *see also Hispanic Soc. of New York City Police Dep't Inc. v. New York City Police Dep't*, 806 F.2d 1147, 1152 (2d Cir. 1986).

class member was not technically a party to the action he could not appeal the trial court's ruling. *Id.* at 6.

In reversing, this Court emphasized the peculiarities of mandatory class-action litigation. Citing Federal Rule of Civil Procedure 23(b)(1), the Court stressed that "petitioner had no ability to opt out of the settlement," *id.* at 10, and given that fact concluded that "[t]he District Court's approval of the settlement – which binds petitioner as a member of the class – amounted to a 'final decision of [petitioner's] right or claim' sufficient to trigger his right to appeal," *id.* at 9 (quoting *Williams v. Morgan*, 111 U.S. 684, 699 (1884)). In the same vein, this Court reiterated:

> What is most important to this case is that nonnamed class members are parties to the proceedings in the sense of being bound by the settlement. It is this feature of class action litigation that requires that class members be allowed to appeal the approval of a settlement when they have objected at the fairness hearing. To hold otherwise would deprive nonnamed class members of the power to preserve their own interests in a settlement that will ultimately bind them, despite their expressed objections before the trial court.

*Id.* at 10.

What the face of this Court's opinion makes plain is that *Devlin* fundamentally concerns the rights of unnamed class members. Indeed, this Court granted certiorari in *Devlin* expressly to "resolve a disagreement among the Circuits as to whether *nonnamed class members* who fail to properly intervene may bring an appeal of the approval of the settlement." *Id.* at 6 (emphasis added). In answer to that question, the Court "h[e]ld that *nonnamed class members* like petitioner who have objected in a timely manner to approval of the settlement at the fairness hearing have the power to bring an appeal without first intervening." *Id.* at 14

(emphasis added). And notably, in the course of arriving at that answer, the Court emphasized both various "aspect[s] of class action procedure" as well as the "goals of class action litigation," *id.* at 9-10, and went on to distinguish *Marino* specifically on the ground the would-be appellants there "were not members of the class." *Id.* at 9. *See also, e.g., Devlin*, 536 U.S. at 3 ("nonnamed member of the class"), 7 ("member of the retiree class"); 7 ("member of the class bound by the judgment"), 9 ("member of the class"), 10 ("class members"), 10 ("nonnamed class members").

*Devlin*'s emphasis on the specifics of class-action procedure has not gone unnoticed by lower courts. Indeed, at least one court has held that *Devlin* applies only to mandatory class actions, *see Ballard v. Advance Am.*, 79 S.W.3d 835, 837 (Ark. 2002), and another has suggested as much in dicta, *see In re General American Life Ins. Co.*, 302 F.3d 799, 800 (8th Cir. 2002). Of course, the *Frazer* case from which the instant petition arises is not a mandatory class action. Indeed, contrary to petitioners' misleading suggestion (*see supra* at 4), *Frazer* is not a class action at all. It is an enforcement action commenced by the United States primarily to vindicate public rather than private interests. Because petitioners are not class members in any underlying class action, they are not "bound" in any relevant sense – *i.e.*, in the *Devlin* sense – by anything a court may say or do in the *Frazer* litigation. *Devlin* simply does not apply. *Cf. Devlin*, 536 U.S. at 16 n.1 (Scalia, J., dissenting) ("Not even petitioner ... is willing to advance the novel and surely erroneous argument that a nonnamed class member is a party to the class-action litigation *before the class is certified.*").

**3.** A further indication of petitioners' misunderstanding of *Devlin* is *AAL High Yield Bond Fund v. Deloitte & Touche LLP*, 361 F.3d 1305 (11th Cir. 2004). In *AAL*, which petitioners do not mention, the Eleventh Circuit rejected a reading of *Devlin* not unlike the one petitioners press here. Just months before filing a

petition for bankruptcy, Just for Feet ("JFF"), a shoe retailer, sold $200 million in corporate notes to two institutional buyers. *Id.* at 1307. The buyers commenced a securities class action against JFF's officers, the underwriter of the note offering, and an outside auditor. *Id.* The officers and the buyers agreed to settle the dispute. The district court preliminarily approved the settlement and, after hearing and overruling the objections to the settlement by the auditor and the underwriter (collectively, the "objectors"), entered an order certifying the class and approving the settlement. *Id.* Given their participation in the note offering, the district court excluded the objectors from the plaintiff class before certification. *Id.* Among other things, the objectors appealed the district court's order excluding them from the plaintiff class. *Id.* at 1308.

On appeal, the Eleventh Circuit squarely addressed the issue whether the objectors, who were excluded from the class before certification and settlement, could appeal the denial of their objections to the certification and settlement without intervening in the action. *Id.* Relying on this Court's decision in *Marino*, the court held that because the objectors were not parties to the lawsuit they "could only appeal the denial of their objections to the class settlement if they had intervened in the action," which they had not. *Id.* at 1309.

Importantly for present purposes, the court expressly rejected the objectors' expansive reading of *Devlin*. In particular, the court noted that "*Devlin* held that nonnamed members of class actions who have timely objected to a class settlement may appeal the denial of their objections without first moving to intervene." *Id.* (citing *Devlin*, 536 U.S. at 14). After noting that the issue framed by the *Devlin* court concerned whether the unnamed class member qualified as a "party" for purposes of Fed. R. App. P. 3(c), the court found that the objectors had "misse[d] the point" of *Devlin*:

> The Objectors first argue that *Devlin* permits their appeal because they could have or should have been included in the plaintiff class. The argument misses the point of *Devlin*, which was to allow appeals by parties who are actually bound by a judgment, not parties who merely could have been bound by the judgment. Persons who are not class members are not bound at all.

361 F.3d at 1309-10 (citations omitted). The court held that it "need[ed] not determine the precise breadth of *Devlin* to see that the Objectors clearly stretch it too far." *Id.* at 1311.

The facts of the instant case are even further afield of *Devlin* because (i) the underlying *Frazer* case is not a class action, and (ii) unlike the objectors in *AAL*, petitioners have not participated in any meaningful way in the *Frazer* proceedings and, indeed, save for their contempt motion, are strangers to the *Frazer* litigation. As stated by the *AAL* court, *Devlin's* import is that it recognizes an appeal right in nonparties *who actually are bound by a judgment of the district court*, as in the case of unnamed class members in a mandatory class-action proceeding, who are bound by operation of law by a case's final disposition. The unnamed class-member objectors in *Devlin* needed a right to appeal because (i) they were bound by court approval of the class settlement and (ii) the named class representatives, whose interests lay in preserving the settlement, could not adequately represent the objectors' interests. *Devlin*, 536 U.S. at 9-10.

Again, non-class actions, like the case at bar, simply do not share these peculiar features of class-action practice. Petitioners, as legal strangers to *Frazer*, are not bound by the *Frazer* injunctions. The court of appeals in *AAL*, like the *Ballard* and *General American* courts before it (*see supra* at 13), correctly recognized the limitations of *Devlin*. *Devlin* is not controlling here – and in light of *Ballard*, *General American*, and *AAL*, certainly not so

obviously controlling as to warrant summary reversal. The petition should be denied.

4. Petitioners also assert that, whatever their relation (or lack thereof) to the *Frazer* litigation, they have an absolute right to appeal the district court's order disposing of "their own motion" for contempt sanctions in *Frazer*. Pet. at 6, 8. In support of that assertion, petitioners cite this Court's decisions in *Blossom v. Milwaukee & Chicago R.R. Co.*, 68 U.S. (1 Wall.) 655 (1863), *Hinckley v. Gilman, Clinton & Springfield R.R. Co.*, 94 U.S. 467 (1876), and *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988).

But those cases, too, are distinguishable. None of those decisions involved an appellant who was for all intents and purposes a legal stranger to the underlying litigation. *Blossom* allowed a bidder for property at a foreclosure sale, who was not a named party to the underlying foreclosure action itself, to appeal a district court's denial of his request to compel the sale. In so doing, the Court likened the bidder's interest in the underlying action to that of a surety, a receiver, or a creditor with a claim to a common fund, all of whom, the Court indicated, had a sufficient stake in the underlying suit to justify appeal. 68 U.S. (1 Wall.) at 656. *Hinckley*, likewise, involved an appeal by an individual who, though not technically a named party to a foreclosure action, had been appointed receiver in that action and, in that capacity, had been ordered by name to pay money into the court. 94 U.S. at 469. And *Catholic Conference* permitted a group of witnesses who had been, but were no longer, named parties to a case to appeal contempt orders against them for refusing to answer subpoenas directed to them in the underlying litigation. 487 U.S. at 75-76.

Petitioners here – who, to reiterate, are the *Crum* plaintiffs – are differently situated. Apart from lobbing in their own motion for contempt sanctions, petitioners have not participated in the district court proceedings in

*Frazer*, which, again, is not a private lawsuit but an enforcement action brought and directed throughout its existence by the named party-plaintiff, the United States. Despite the seeming factual similarities between *Frazer* and *Crum* (*e.g.*, overlapping defendants, legal issues), petitioners' legal interest in *Frazer* is not direct, but is at most incidental.

Petitioners' lax approach to standing – that any person, no matter how distant his relation to the underlying litigation, has an absolute right to appeal the disposition of any motion he may file in that litigation – surely proves too much. It would throw wide open the gates to random, oddball – and worse, malicious – filings. There is certainly no principle inherent in petitioners' position that would limit its application to non-parties who just so happen to be involved in a factually similar (though separate) proceeding, or to such a non-party's request for contempt sanctions. Rather, petitioners' absolute rule would permit any person, no matter how alien to the case and how bizarre his motion, to interject himself into trial proceedings and then, when disappointed with the trial court's disposition of one of his filings, to compound the congestion of the judicial system by seeking review in the court of appeals. In sum, petitioners' position, which would unleash untold motions and appeals by nonparty bystanders and sideline-sitters, presents a very real Pandora's-box problem.[10]

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[10] Appeals of denials of formal motions to intervene, upon which petitioners seek to rely in support of a broader appeal right (Pet. at 9), present a special circumstance. By moving to intervene in a case, a non-party seeks to affiliate himself formally (and appropriately) with a trial proceeding, and thereby to subject himself to the rules and burdens applicable to parties of record. The would-be intervenor, who demonstrates his commitment to the litigation he seeks to join, should have appellate review of his effort to affiliate. Again, as of the time their motion for contempt sanctions was denied, petitioners (who have only since been permitted to intervene, *see supra* at 5 n.7) were differently situated. They were legal strangers to the *Frazer* litigation,

5. There is one final point. The petition implicitly suggests that if this Court does not grant the writ and summarily reverse, petitioners' opportunity to raise – and this Court's opportunity to address – the underlying Rule 71 issue will be forever lost. That is not the case. Petitioners have invoked Rule 71 as a means of enforcing the *Frazer* injunction not only in this case (*i.e.*, *Frazer*) but also in their own case, *Crum*. While the Eleventh Circuit recently denied petitioners' attempt to appeal the Rule 71 issue interlocutorily in *Crum* (*see supra* at 6-7), it has not definitively resolved that issue one way or the other. The issue remains open and, as the named plaintiffs in *Crum*, petitioners have the right to appeal the district court's Rule 71 decision upon final disposition of that case pursuant to 28 U.S.C. §1291. Following the Eleventh Circuit's decision of the Rule 71 issue in *Crum*, petitioners may of course seek this Court's review.

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whose only formal involvement had been to lob in a single motion from the sidelines.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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IN THE

# Supreme Court of the United States

Eugene Crum, Jr., et al.

*Petitioners*,

v.

Thomas G. Flowers, et al.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

## PETITIONERS' REPLY BRIEF

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## PETITIONERS' REPLY BRIEF

Respondents acknowledge that *Devlin* v. *Scardelletti*, 536 U.S. 1 (2002), like numerous prior precedents, "recognize[d] an appeal right in nonparties *who actually are bound by a judgment of the district court*." BIO 15 (emphasis in original). That principle is dispositive here. Petitioners are indisputably bound by the district court judgment from which they appealed, because it disposed of petitioners' own motion. As the petition made clear, petitioners have the unassailable right to appeal that judgment, and the Eleventh Circuit's holding to the contrary conflicts with an uninterrupted line of this Court's precedent and merits summary reversal. Respondents' efforts to defend the court of appeals' indefensible holding are unconvincing.

1. Respondents contend that *Marino* v. *Ortiz*, 484 U.S. 301 (1988), stands for the proposition that persons who are neither original parties to, nor intervenors in, an underlying lawsuit may never appeal any judgment in that lawsuit. But in *Devlin*, this Court firmly rejected that contention:

> We have never * * * restricted the right to appeal to named parties to the litigation. * * * In [*Marino*], we refused to allow an appeal of a settlement by a group of white police officers who were not members of the class of minority officers that had brought a racial discrimination claim against the New York Police Department. Although the settlement affected them, the District Court's decision *did not finally dispose of any right or claim they might have had* because they were not members of the class.

536 U.S. at 7, 9 (emphasis added).

Here, unlike in *Marino*, the district court's dismissal of the appellants' motion finally disposed of the appellants' claim: namely, petitioners' right to enforce the *Frazer* injunction pursuant to Federal Rule of Civil Procedure 71. Petitioners, of course, appeal *only* that final disposition.

Petitioners' right to appeal arises not merely from the fact that they are affected by the district court's judgment, but from the fact that they are *bound* by it. Nor is petitioners' right to appeal based on their status as "putative class members in an altogether separate discrimination case" (BIO 11); rather, it is based on their status as the persons who filed the motion that the district court denied. If petitioners cannot appeal that denial, nobody can, and respondents have presented no justification for creating a category of final district court orders immunized from any appellate review. Indeed, because persons who file Rule 71 motions are by definition nonparties in the underlying litigation, the Eleventh Circuit's holding would make the denial of Rule 71 motions *always unappealable*. There is no support for stripping proceedings on an important Rule of Civil Procedure from the jurisdiction of the courts of appeals.[1]

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[1] Respondents cite *Marino* for the proposition that petitioners should be required to intervene for the purposes of appeal. But that argument, too, was squarely rejected by the Court in *Devlin*, and it is also inconsistent with a long line of this Court's cases, discussed below, permitting nonparties—without intervention—to appeal collateral orders that bind them. An intervention requirement would make the right to appeal even judgments that bind the would-be appellant contingent on the district court's discretion, allowing district courts to insulate their own holdings from review. Such a right is no right at all. And an intervention requirement makes even less sense in the context of Rule 71 motions, since bringing a Rule 71 motion is a form of quasi-intervention and has been treated as a form of intervention by the lower courts; like Rule 24 intervention, it is a way for a nonparty to assert the right to participate formally in the case. See, *e.g.*, *Berger* v. *Heckler*, 771 F.2d 1556, 1565 n.13, 1566 (CA2 1985) (referring to "Rule 71 intervenors" and the right to "intervene under Rule 71"). To require unsuccessful Rule 71 intervenors to subsequently move to intervene for the purposes of appeal would be redundant and wasteful, and should not be required, just as would-be intervenors

2. Respondents' efforts to distinguish *Devlin* are unavailing. First, the central proposition for which *Devlin* stands, as respondents themselves acknowledge (BIO 15), is that persons bound by a final district court judgment may appeal. This proposition is not limited to the mandatory class action context. Indeed, to support it, *Devlin* relied on three of this Court's previous cases, none of which involved class action procedures. See *United States Catholic Conference* v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988); *Hinckley* v. *Gilman, C., & S.R. Co.*, 94 U.S. 467 (1877); *Blossom* v. *Milwaukee & Chicago R. Co.*, 68 U.S. (1 Wall.) 655 (1864).

Consistent with Devlin, every other court of appeals rejects respondents' view of appellate standing. No other circuit has taken the position adopted by the Eleventh Circuit in this case—that nonparties to the underlying litigation are, merely by virtue of their status as nonparties, barred from appealing orders that finally dispose of their own claims. See, *e.g.*, *Pediatric Specialty Care, Inc.* v. *Ark. Dep't of Human Servs.*, 364 F.3d 925 (CA8 2004) (holding that nonparties may appeal orders that purport to bind them); *Karaha Bodas Co.* v. *PERTAMINA*, 313 F.3d 70, 81-82 (CA2 2002); *Dellwood Farms, Inc.* v. *Cargill, Inc.*, 128 F.3d 1122, 1125 (CA7 1997) (holding that nonparties, unlike parties, may appeal discovery orders because they have "no appellate remedy at the end of the litigation"); *Maiz* v. *Virani*, 311 F.3d 334 (CA5 2002) (nonparties may appeal a district court order that has effect of divesting them of property because they "allege an actual injury" that gives them a "sufficient personal stake"). Indeed, many courts of appeals apply an equitable standard that permits nonparties to appeal even orders *not* issued in response to their own motions or otherwise directly

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are not required to attempt to intervene a second time for the purposes of appealing the denial of their Rule 24 motions.

purporting to bind them. See, *e.g.*, *Binker* v. *Pennsylvania*, 977 F.2d 738 (CA3 1992); *EEOC* v. *Pan American World Airways*, 897 F.2d 1499 (CA9 1990).[2]

Second, any distinctions between this case and *Devlin* make this case by far the *easier* of the two; indeed, it proceeds *a fortiori* from *Devlin*. The reason the Court referred in *Devlin* to the nature of the mandatory class action procedure, under which a non-named class member is bound by a settlement, is because in *Devlin* the *only* asserted basis for the petitioner's standing to appeal—the only reason the petitioner was bound by the settlement he appealed—was his status as a member of the class. Here, in contrast, petitioners, although not named parties to the underlying *Frazer* litigation itself, appealed from a collateral order in that litigation that bound them directly and on its face by denying their own motion. Petitioners' standing to appeal (as opposed to the merits issue—their right to enforce the *Frazer* injunction) does not in the least depend on whether they are members of a "class" of intended beneficiaries of *Frazer*. As parties to the collateral order being appealed, petitioners clearly have standing not just under *Devlin*, but even under the more

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[2] The Eleventh Circuit's decision in *AAL High Yield Bond Fund* v. *Deloitte & Touche LLP*, 361 F.3d 1305 (2004), is not on point. In *AAL*, the court emphasized that the appellants, having been excluded from the class, were not bound in any way by the settlement they sought to challenge (*id.* at 1309-10); here, petitioners are bound. An objector's appeal from the denial of objections to a class action settlement is a challenge to the settlement itself, not to a collateral order, and so the relevant question is whether the settlement binds the objector. In any event, even if *AAL* could be read to support the proposition that nonparties to underlying litigation other than class members may never appeal, that fact would in any event argue more strongly in favor of a grant of certiorari (and summary reversal), since it simply would demonstrate the Eleventh Circuit's repeated refusal to obey this Court's precedent, and would deepen the split among the courts of appeals as to the scope of *Devlin*'s holding.

restrictive view of appellate standing embraced by the *Devlin* dissent. See Pet. 8-9.

3. This case is thus controlled by this Court's holdings in *United States Catholic Conference*, *Hinckley*, and *Blossom*, all of which established that a nonparty to underlying litigation has the right to appeal from the denial of his own collateral motion. As with *Devlin*, respondents attempt to limit these decisions to their bare facts, contending that none of them "involved an appellant who was for all intents and purposes a legal stranger to the underlying litigation." But petitioners here are no more "legal strangers" to the underlying litigation than were the appellants in those three cases. It is untenable to suggest that a bidder for property at a foreclosure sale, like the appellant in *Blossom*, is more deeply involved with the underlying litigation than petitioners here are; that foreclosure litigation had nothing whatsoever to do with the bidder, but simply had the effect of providing that bidder (and everyone else in the world) an opportunity to buy the property. The bidder's right to appeal was grounded not on his legal status in the *underlying litigation*, but on the fact that he brought a motion to compel the sale and that motion was denied. Like petitioners here, he appealed only the order that bound him by denying his motion.

Similarly, in *Hinckley* and *United States Catholic Conference*, the appellants were "legal strangers" to the underlying litigation in the same, immaterial sense that respondents contend is true here: those appellants were not named parties and were bound only by those specific orders that directly purported to bind them. Indeed, that principle of appellate standing has been firmly grounded in this Court's precedents for well over a century. See, *e.g.*, *Williams* v. *Morgan*, 111 U.S. 684, 698-99 (1884) (citing five previous such cases in various contexts, and following *Blossom* to uphold the appellate standing of foreclosure sale purchasers).

Respondents convolute matters by emphasizing that petitioners are not bound *by the* Frazer *injunction itself*, which

is true but irrelevant. See BIO 15. Petitioners are not appealing from the *Frazer* injunction, so it does not matter whether they are bound by it. What matters is whether they are bound by the order from which they are appealing. And they are clearly so bound, notwithstanding respondents' bizarre contention that because petitioners are "not class members in any underlying class action, they are not 'bound' in any relevant sense—i.e., in the *Devlin* sense—by anything a court may say or do in the *Frazer* litigation." Many things courts say or do bind nonparties in a relevant sense, notably including the issuance of contempt orders against witnesses (*United States Catholic Conference*), orders to receivers to make payments (*Hinckley*), and orders denying collateral motions brought by those nonparties (*e.g.*, *Blossom*, *Williams*, and this case). Petitioners are, as a result of the denial of their motion, precluded from seeking to enforce the *Frazer* motion pursuant to Rule 71.[3]

4. Petitioners' argument—the exact same argument this Court has repeatedly endorsed—thus hardly threatens to "throw wide open the gates to random, oddball—and worse, malicious—filings." BIO 17. The right to appeal a district court's final disposition of one's own motion has *always* been recognized, and respondents' "Pandora's box" has proved to be empty. *Id.* Random, oddball, and malicious filings can be thrown rapidly out of court on any number of grounds (and lawyers sanctioned for filing them), and courts of appeals can

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[3] Respondents' assertion that petitioners retain an equivalent right to appeal the district court's Rule 71 holding through a later appeal in the *Crum* litigation is inaccurate. The most that respondents can offer is the prospect that years down the road when the *Crum* litigation is completed petitioners could bring such an appeal. But that appeal would be meaningless; the Rule 71 right would be empty if enforcement could only be sought *after* relitigating the claims underlying the initial injunction. As explained in the petition, Rule 71 exists precisely to avoid such relitigation.

quickly affirm those dismissals; they do not need an artificial limit on appellate standing that allows serious errors in the district court to go completely unredressed to prevent the parade of horrors respondents conjure.

Moreover, this Court would not have to endorse the "absolute rule" respondents wrongly ascribe to petitioners—"that any person, no matter how distant his relation to the underlying litigation, has an absolute right to appeal the disposition of any motion he may file"—in order to conclude that summary reversal is appropriate here. Indeed, it is the court of appeals' stance that is indefensibly absolute: that the petitioners, for the *sole and sufficient* reason that they are not named parties, lack standing to appeal. Petitioners, by contrast, acknowledge that there are numerous appropriate limits on the right to appeal; but this case does not present any. Petitioners are not "alien" to the case, and their motion is not "bizarre." *Id.* They are the very class of people whose rights under the Constitution and the civil rights laws are at stake in the *Frazer* litigation, and as intended beneficiaries of the *Frazer* injunction they have a right to enforce it under Rule 71; at the very least, their construction of Rule 71 (which has been accepted by several circuits) is not even remotely frivolous. There is therefore no judicial efficiency justification for the unprecedented limit on appellate standing that the court of appeals adopted here.

5. Finally, this Court's intervention is warranted because, as the petition demonstrated, this case is of extraordinary importance for the civil rights of the African-American citizens of Alabama. This is no mere two-party litigation. Rather, it concerns the rights of over 100,000 state employees and job applicants. And it does not simply concern the "last vestige[s]" of past discrimination (BIO 4), but rather ongoing and systematic violations of civil rights, including many of the same practices that the district court has previously found unlawful in the *Frazer* litigation. This is why, notwithstanding the respondents' suggestions to the contrary, the *entirety* of the *Frazer* injunction remains in

place. Respondents point only to a single provision of the injunction (the "no-bypass rule") that they have moved the district court to terminate (BIO 3); but litigation over that issue is ongoing, and that rule amounts to only a tiny fraction of the injunction's provisions. Respondents implicitly challenge the continued appropriateness of the injunction, contending the state's practices have changed sufficiently to make it unnecessary. That contention is wholly inconsistent with the facts, but it is also irrelevant; whether the injunction should continue is not presented by this case. The injunction remains in force today, and the respondents have already repeatedly violated it and are continuing to do so, as petitioners have alleged and will prove when they are permitted to bring their contempt motion.[4]

Serious racial discrimination in public employment is an unfortunate reality, and the ability of petitioners to enforce the *Frazer* injunction by seeking civil contempt sanctions is an important weapon against that discrimination. The Federal Rules of Civil Procedure provide third-party beneficiaries of injunctions with an enforcement right in order to prevent them from having to relitigate liability and remedial issues already decided by the federal courts. The court of appeals' decision in this case will result in precisely such wasteful relitigation, remove the teeth from the *Frazer* injunction, and

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[4] Petitioners' contempt motion alleges that numerous different current state employment practices violate the injunctions, such as, for example, the use of "closed registers" that have the effect of freezing African Americans out of employment opportunities, and a failure to require that certified African Americans who are eligible be interviewed. Contempt Mot., No. 94-T-356-N at 10, 12 (April 5, 2001). And, indeed, the motion alleges that the state has simply circumvented the "no-bypass" rule; that rule requires the state to hire African Americans unless there are "higher-ranking white applicants," but the state has "complied" with it, if at all, by manipulating the ranking process to ensure that white applicants rank higher. *Id.* at 7.

severely set back Alabama's progress toward dismantling the system of occupational segregation that today continues to hobble the prospects of its African-American citizens.

## CONCLUSION

For the foregoing reasons, and those presented in the petition, this Court should grant certiorari and summarily reverse the judgment of the court of appeals.

Respectfully submitted,

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